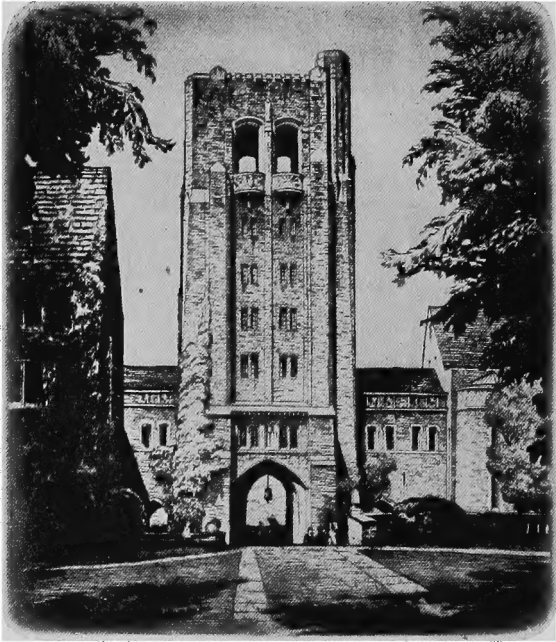


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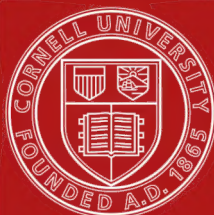
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THE LAW OF WILLS:

EMBRACING

DEVICES, LEGACIES, AND TESTAMENTARY TRUSTS;
THEIR CONSTRUCTION, DISCHARGE, AND
MODE OF ENFORCEMENT.

BY

ISAAC F. REDFIELD, LL.D.

VOL. II.

THIRD EDITION.

CAREFULLY REVISED AND ENLARGED.

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1876.

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PREFACE TO THE THIRD EDITION.

WE have carefully revised this volume, and inserted every English decision, bearing upon the questions discussed, made since the former edition; and as many American cases as seemed to us compatible with the scope of the work and the space at our command. In other respects we have not found it essential to make any important changes. The course of the decisions, towards reaching by construction the obvious intent of the testator, will be found noted, in the appropriate places, upon many important points.

I. F. R.

Boston, March 10, 1876.

PREFACE TO THE SECOND EDITION.

THIS portion of our work, on the Law of Wills, has been now nearly four years before the profession, and has obtained a very encouraging sale,—about twice the number of copies usually printed in a single edition. In this mode we have obtained more time for the preparation of the present edition; and we have endeavored to use it faithfully, and to make this part of the work as complete as possible within the compass of a single volume. It now covers the entire ground occupied by the model work of Mr. Roper, and his learned editor Mr. White, whose courtesy and kind attentions, while in London, we desire specially to acknowledge.

We believe this volume will be found to contain all that is essential, either to the practitioner or the student, upon all the topics discussed, and in the briefest space consistent with clearness and fulness. We have taken great pains to have the work accurate and perspicuous, so that the student need never fail to comprehend its propositions at a single glance, and that no one might be embarrassed in reaching the authorities quoted through misdescription, or disappointed in discovering that they do not justify the

doctrines of the book. We have, no doubt, suffered some errors to escape correction, and may have often failed in our construction of cases. But for all errors and omissions we crave the same generous indulgence hitherto extended to us.

I. F. R.

Boston, April 10, 1870.

PREFACE TO THE FIRST EDITION.

WE now offer the profession the Second Part of our work on Wills and the Settlement of Estates. It has extended beyond the limits originally proposed, in order to embrace all the topics which seemed indispensable in a work of this kind. The present volume contains an extended and carefully prepared treatise upon the important topics of Legacies, including Devises and Charitable Trusts; together with the Duties of Executors, Administrators, and other Testamentary Trustees; including the Settlement of Administration Accounts, the Marshalling and Distribution of Assets, and all other matters coming within the range of the Settlement of Estates, both testate and intestate.¹

The whole has been brought within such compass as to be readily mastered by the student; and at the same time the several subjects are treated so much in detail, as to afford, we trust, a safe guide to the profession. It is scarcely necessary to say to those who understand the wide range of the subject, and the immense number of the cases both English and American, that it has been a work of very great labor, and one not unattended with perplexity both in the arrangement and the detail. But we hope we have overcome these difficulties in such a manner as to

¹ The Second Part originally embraced what in the present edition makes the Second and Third Parts.

render the work a perspicuous and interesting manual, as well of the principles as the decided cases, both for the student and the practitioner.

We have not attempted to refer to every case, even in the English Reports, but have contented ourselves with giving the present state of the law, and tracing the history of its development, by the decided cases, so far as seemed desirable, either for accuracy or instruction; and we trust the profession will find it an accurate and reliable statement of the law, and especially the English law, upon the topics discussed.

We have endeavored to embrace, in the two Parts of the work, all the topics discussed either in Jarman, Williams, or Roper, so far as applicable to the American practice. In doing so, we have necessarily felt compelled to abbreviate the discussion of some of the less important of those topics, but not, we trust, in such a manner as to render it obscure or unsatisfactory.

In regard to the American Decisions, we have intended to present them to such an extent, upon all controverted questions, as to afford a clear indication of their direction and results; and in regard to some of the older States, whose jurisprudence has served the purpose of a leader and guide to those States whose origin is more recent, we trust our analysis of the cases will be found nearly complete upon all the important topics discussed. But when it is considered that probably more than a hundred volumes of American Law Reports are published annually, all professing to follow in the same line of precedent with the English Common Law, and thus presenting the same point in different States, year after year, and all the same way, it could answer no good purpose to encumber the pages of a law-book with a constant multiplication of citations upon

points never controverted. Unless, therefore, where some conflict existed in the English decisions, or else where the rules of the English law were regarded inapplicable to our circumstances and condition, or were evidently founded in misapprehension or false constructions, — unless in one or other of these exceptional views, we have not regarded it important to multiply references to cases throughout the country. But we believe our citation of American Cases will be found entirely satisfactory to the profession, as showing the present state of the law in the several States.

In conclusion, we can only say, that, if the work should prove as useful to the profession as it has been laborious and difficult in the preparation, the author will feel that he is amply repaid; and he will, in any event, have the consolation of having attempted to produce a good book upon an important subject, and in a field hitherto but little occupied by American law-writers.

I. F. R.

Boston, May 1, 1866.

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THE LAW OF WILLS.

PART II.

DEVISES, LEGACIES, AND TESTAMENTARY TRUSTS.

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PART II.

DEVISES, LEGACIES, AND TESTAMENTARY TRUSTS.

CHAPTER I.

CREATION AND EFFECT OF DEVISES AND LEGACIES AND OTHER TESTAMENTARY TRUSTS.

SECTION I.

DESCRIPTION OF THE LEGATEE, AND WHO MAY BE SUCH.

1. Certain classes of persons, by English statutes, placed under disabilities as to legacies.
2. Effect of witnesses to will being interested under it.
- n. 3. Effect of witness to will being also legatee, further discussed.
3. Devisee or legatee being an alien.
- n. 7. Effect of alienage, under different circumstances, discussed.
4. The effect of an attainder of felony and transportation.
5. Devises to foreign corporation upheld.
6. Bequests made in the Confederate states during the separation valid.
7. How far bequests affected by want of incorporation of legatee or devisee.

§ 1. 1. THE English statutes place several classes of persons — such as traitors, artificers going abroad and not returning when required by the English ambassadors, persons refusing to accept certain oaths, and persons *twice* convicted of denying the truth of Christianity, or the divine authority of the Scriptures — under disabilities as to receiving legacies.¹ But as no similar disabilities

¹ 1 Roper on Legacies, 28.

exist in any portion of the American states, we shall not discuss them.

2. It was first decided in England, in the case of *Holdfast d. v.*

Dowsing,² after three arguments in the King's Bench, that
 * 4 a * subscribing witness to a will, who derived any legacy, for himself, or his wife, under the will, was thereby rendered incompetent, and the will avoided, unless there were the requisite number of witnesses besides. This led to the passing of a statute³ declaring the legacy to any subscribing witness to a will, void, thus preserving the competency of the witness. Similar statutes have been passed in most of the American states. The only general question which has arisen in the English courts in

² 2 *Strange*, 1253.

³ 25 Geo. 2, ch. 6. See also Statute, 1 Vict. ch. 26, by which this statute is so amended as not to apply to a legacy in payment of debts, or where the debt is merely made a charge upon the real estate. Considerable controversy at one time existed in the English courts in regard to the point whether a witness to a will who had a beneficial interest under it, or was interested in the will, at the time of its execution, was so restored to his competency, by the removal of that interest before the time of proving the will, that he might be regarded as a valid witness under the statute of frauds, which required three credible witnesses. In *Holdfast v. Dowsing*, supra, it was considered that the competency of the witness must exist at the time of attestation. And Lord *Camden* (*Powell on Devises*, 133) took the same view, which indeed has more generally prevailed. *Hawes v. Humphrey*, 9 Pick. 350; *Cornwell v. Isham*, 1 Day's Rep. 35, 41, and note. But the Court of King's Bench (*Windham v. Chetwynd*, 1 Burrow, 414) held that the fact that the witnesses were interested at the time of attestation did not invalidate the will, the witnesses being still credible within the statute. But the only interest here claimed to exist was that of certain debts charged by the will upon the real estate of the testator, which, although making a security for the debts dependent upon the will only, as the English law then stood, would create no interest, as the law stands in this country, since all debts are a lien upon the real as well as personal estate, independent of the will. 4 Kent, Comm. 509, 510; ante, vol. 1, § 21, where the point is more extensively considered. It has been held that if either the husband or wife be a witness to the will, any legacy or devise to the other becomes void, and the witness competent. *Jackson v. Woods*, 1 Johns. Cas. 163; *Jackson v. Durland*, 2 id. 314. The statute does not avoid a devise or legacy to the sons or heirs of the witnesses to a will, since the heir has no vested interest in a bequest to his ancestor still living. *Allen v. Allen*, 2 Overt. 172. In *Cornell v. Woolley*, 3 Keyes, 378, where one of the witnesses to a will resided without the state, and was a devisee under it, it was held that as his testimony, on account of his being a non-resident, was not requisite to establish the will, therefore the devise would not be avoided.

regard to the effect of this statute is, whether it was intended to extend to wills of personal property only, which at the date of the statute were not required to be in writing.⁴

3. Alienage of the legatee may affect the right to hold the legacy. * An alien friend is allowed to take a bequest of personalty,⁵ although not a devise of real estate.⁶ But an alien enemy cannot claim the enforcement of any personal right, either by contract, gift, or in any other mode; and a natural born, or naturalized citizen stands in the same light as an alien enemy, if he reside abroad in an enemy's country, and is there engaged in business,⁷ during the existence of hostilities.

4. By the English law an attainder of felony defeated all rights of action of every kind in the felon, which vest in the crown, without the formality of office found, and in case of transportation the civil rights of the offender are not restored until the expiration of

⁴ In regard to this point, see *Lees v. Summersgill*, 17 Vesey, 508; *Brett v. Brett*, 3 Add. 210, 213; *Constable v. Steibel*, 1 Hagg. (Prerog.) 56; *Emanuel v. Constable*, 3 Russ. 436; *Foster v. Banbury*, 3 Sim. 40.

⁵ 1 Roper, 29; ante, vol. 1, § 3.

⁶ *Calvin's Case*, 7 Co. Rep. 1. The natural offspring of a naturalized alien, if born and residing abroad, are not affected by the act of Congress declaring the children of citizens, born abroad, to be themselves citizens, natural offspring not being regarded as children. *Guy v. Smith*, 22 Md. 248.

⁷ *M'Connell v. Hector*, 3 B. & P. 113, 114. The reason here assigned for this proposition is, that, while the citizen or denizen of the country has his permanent domicile abroad, and in an enemy's country, he is entitled to all the rights, and subject to all the disabilities, of a citizen of that country. And if he were allowed to recover a judgment or legacy, the money thus put into his power would be conveyed into the enemy's country, and go to his sustenance and support, and thus effectually contravene the fundamental ground upon which an alien enemy is denied those privileges. 1 Roper, 30. It seems that, if the war be terminated before the sovereign take the forfeiture of such legacy, the right of the legatee is thus rendered valid. 1 Roper, 30; *Atty.-General v. Weeden, Parker*, 267. It is undoubtedly true that some nice distinctions have been attempted, in the English courts, in regard to the right of an alien to enforce a bequest, which by the terms of the will was made a charge on lands. But we do not regard the question as of sufficient importance to refer minutely to the points decided in the English cases. It is obvious, that so far as the alien legatee can enforce his claim upon the estate, through the executor, and without resort to the land itself, by way of acquiring interest, or title in it, his claim will be valid, notwithstanding his alienage. But where his only remedy is upon the land, the plea of alienage might be interposed in such a way as to defeat him. 1 Roper, 29, 30, and notes; ante, vol. 1, § 3, where this point is more fully discussed.

the term of the sentence.⁸ And even where the residue of an estate devolved upon a convict, after his conviction, it was held that having accrued during the period of transportation, it consequently belonged to the crown.⁹ But where the legacy is contingent,

* 6 and * does not vest in the convict until after the expiration of his term of transportation, it will not be defeated, the enduring of the punishment, under the English statutes, operating as a pardon, thereby restoring civil rights and disabilities.¹⁰

5. Devises of land to foreign corporations are, in general, held valid,¹¹ unless for reasons of special and local policy, as in some of the Southern states during the existence of slavery.¹²

6. And since the civil war there seems no reason to doubt that bequests made in the Confederate states during the separation must be held valid, being made while both the testator and devisee were subject to an existing government or policy, in regard to submission to which they had no choice, and by force of whose laws contracts and instruments were upheld, and are still upheld, by the rightful government, unless where they affect or are affected by questions of allegiance.¹³

7. By the laws in Maryland, a bequest to an unincorporated society is void for want of legal power to take.¹⁴ And in Louisiana a bequest to an unincorporated society is invalid, and will not be made good by its subsequent incorporation. So, also, the bequest fails, although made to an incorporated society, where there is a defect of capacity to take.¹⁵ But charitable trusts to unincorporated societies have more commonly been upheld by the courts of equity.¹⁶ And this has been done, even where the bequest was made to trustees for the benefit of an incorporation thereafter to be procured by such trustees within two years.¹⁷ But it has been held, in New

⁸ *Bullock v. Dodds*, 2 Barn. & Ald. 258.

⁹ *Roberts v. Walker*, 1 Russ. & My. 752.

¹⁰ *Stokes v. Holden*, 1 Keen, 145.

¹¹ *Burbank v. Whitney*, 24 Pick. 146; *State v. Boston, Concord, and Mont. Railw.*, 25 Vt. 433.

¹² *Wade v. Colonization Society*, 7 S. & M. 663.

¹³ *Corbett v. Nutt*, 18 Gratt. 624. ¹⁴ *Meade v. Beale*, Taney C. C. 339.

¹⁵ *Succession of Hardesty*, 22 La. Ann. 332. A legacy to a slave, although void on that account at the decease of the testator, was upheld, as a trust, for the benefit of the person when emancipated. *Hoover v. Brem*, 43 Miss. 603.

¹⁶ Post, § 36, pl. 60 and n. et passim.

¹⁷ *Burrill v. Boardman*, 43 N. Y. 254.

York, that a devise of land in that state, to a corporation out of the state, to be effectual, must be valid, at the decease of the deviser, by the laws of that state; nor can a devise in that state of land there, to an unincorporated society, or to one incorporated but not capable of taking the bequest at the decease of the testator, be made operative, in either case, by an act of incorporation or enlargement of the former charter.¹⁸

SECTION II.

LEGACIES TO A CLASS, AS TO CHILDREN AND OTHER RELATIONS. RULES OF CONSTRUCTION.

1. Bequest to the children of the testator, or of any one, includes all at the death of testator.
2. Bequests to a class include all in the class at the time the bequest takes effect. Estate may vest before birth of devisee.
3. The force of the terms "begotten," or "to be begotten," may mean legitimate, or after-born.
4. The difficulty of carrying a provision into effect no reason for rejecting it. The rule extensively illustrated.
5. Devise to one and his children may create a joint-tenancy, or an estate-tail.
6. Explanation of the principle here involved.
7. The word "children" must have its primary force where it can.
8. It may, from necessity or otherwise, have a more extended import.
9. The same rule applies to the use of the word "grandchildren."
- * 10. How far defect of persons answering primary import will affect construction. * 7
11. Definition of the proper grounds of construction; relative terms.
 - (1.) To extend the primary import of such terms the intention must be clear.
 - (2.) The American courts reluctantly depart from the obvious intent of testator.
 - (3.) Illustration of the difference between the English and American rules of construction.
 - (4.) Not requisite to exclude all possible contingency to admit a secondary sense.
 - (5.) Where "children" extends beyond literal import, generally includes all descendants.
 - (6.) Construction of will not affected by contingencies not anticipated by testator.
12. The same rules of construction apply to other relative terms, as "nephews," "nieces," "cousins," &c.
13. And the same also to the admission of illegitimate children, as "children."

¹⁸ *White v. Howard*, 46 N. Y. 144.

14. How far natural children, in ventre sa mère, can take under will.
15. How far legacies given, in particular character, depend upon the truth of that character.
16. If person clearly identified, and no fraud, legatee will take. "Wife" means wife at date of will.
17. "Children" will include those by different marriages.
18. Relative terms include all relations of the half-blood.
19. But very clear intention is required to include those by affinity.
- n. 19. Sir James Wigram's third proposition, and its application.
- n. 31. How far the intention of testator is to be followed.
- n. 47. How far after-born natural children may be provided for in a will.
20. The American cases profess to follow the principle of the English cases.
21. Abstract of some recent decisions in Pennsylvania.
22. Where the gift over is made to depend upon the pre-decease of one not in life at the death of testator, all born into class before death of testator will share.
23. Rule of construction of word "children," by late American cases.
24. Case in Connecticut illustrating the preceding rules.
25. Legatees take per capita unless there is something to indicate a contrary purpose.
26. Law of North Carolina in regard to legacies to a class vesting.

§ 2. 1. THE general rule in regard to the construction of a legacy to children, and especially the children of the testator, is that it will include all in existence at the death of the testator,¹

¹ *Ringrose v. Bramham*, 2 Cox, 384. A court of equity is always anxious to include all children in existence at the death of the testator. *Matchwick v. Cock*, 3 Vesey, 609, where the Master of the Rolls, Sir R. P. Arden, said: "I must construe it every way, if possible, to apply the words to after-born children." And in this case, notwithstanding the terms of the will were so explicit as to exclude children born after the date of the will from participating in the capital of the estate, it was nevertheless held, that a direction for the maintenance of the testator's children during the life of the testator's wife, should extend to all the children. And the same construction was adopted in *Freemantle v. Taylor*, 15 Vesey, 363. And bequests to the children of other persons than the testator have sometimes been restricted to those in existence at the decease of the testator. *Roberts v. Higman*, 1 Br. C. C. 532, in notes. But there are other cases where after-born children have been permitted to come in, in cases of this character, upon the use of general terms, such as the children of my two daughters. *Mills v. Norris*, 5 Vesey, 335. And there is always a presumptive probability, that such would naturally be the purpose of the bequest. Thus a devise in remainder to all the children the testator's brother might leave, was held to include all the children of the brother living at his decease, and a child born after. *Doe v. Clarke*, 2 H. Bl. 399. And the same construction was adopted in *Gilmore v. Severn*, 1 Br. C. C. 582. But see *Prescott v. Long*, 2 Vesey, jr. 690; *Hoste v. Pratt*, 3 Vesey, 730, where children born after the period of distribution are excluded from participation, which seems necessary, and is supported by the cases generally.

* unless there is something upon the face of the will to show * 8
that it was intended to have a more limited application.² In

Whitbread v. Ld. St. John, 10 Vesey, 152; *Gilbert v. Boorman*, 11 Vesey, 238. In *Evans v. Harris*, 5 Beav. 45, the testatrix gave two sums of money and £5,000 in stock in trust, to pay the dividends to her nephew for life, or till some child of his should reach twenty-one, and then and as such children should reach twenty-one, to transfer to every such child £1,000, in stock, out of the principal of the trust-fund, and pay the residue to her nephew for life. At the death of the testatrix he had one child; he afterwards had ten other children, of whom seven were living; of whom two, having attained twenty-one, claimed their £1,000, and payment was decreed.

The right of after-born children of third persons to share in a bequest was recognized in *Hutcheson v. Jones*, 2 Madd. 124. And a bequest to one's youngest child will go to the only child of such person, at the time of vesting, although it be the oldest, and she have two younger ones born afterward. *Emery v. England*, 3 Vesey, 232. See also *Trafford v. Ashton*, 2 Vernon, 660; *Hall v. Hewer*, Amb. 203.

A bequest to the child of testator in ventre sa mère, by the terms "posthumous child," where the testator survived the birth, was held good. *Jaggard v. Jaggard*, Prec. Ch. 177. And upon a devise to the child of A., B., C., and D., the former only having one child at the date of the will, it was held that, as each of the others had a child born, the estate vested in such child, and that the devise therefore took effect in favor of the eldest child of each of these persons. *Powell v. Davies*, 1 Beav. 532. The forms of expression used in the will often induce the court to restrict words applicable to a class of persons to individuals of the same general class, known to the testator at the date of his will. *Havergal v. Harrison*, 7 Beav. 49. And so when the issue of persons described by relation is named to have the portion of any one that shall decease during the life of the testator, such issue will take only in substitution of such as were living at the date of the will. *Christopherson v. Naylor*, 1 Mer. 320. And also to such as come within the terms of the will. *Hunter v. Cheshire*, 21 W. R. 778. But see *Potter's Trusts*, L. R. 8 Eq. 52; 17 W. R. Ch. Dig. 186. It is not requisite for legatees, in remainder or in substitution, to survive the period of distribution, in order to take. *Orton's Trust in re*, Law Rep. 3 Eq. 375. What will indicate a purpose in the testator to have legatees take per stirpes. *Ibid.* So also when the testator devised to his three daughters, A., B., and C., and the children of his son D., his homestead, it was held indicative of a purpose to have the devisees take per stirpes. *Lyon v. Acker*, 33 Conn. 222. And the same thing was inferred by the court, where the testator left three sons, each of whom had children, and the daughter of a deceased son; and by his will provided certain income to his three sons from real estate, for a term of years, and also provided for his grand-daughter for the same period; and after that period directed that one-half of all his

² *Sherer v. Bishop*, 4 Br. C. C. 55. See also ante, note 1.

* 9 this case the * bequest was to the six children of A., he having six at the date of the will, and one born after, and before the
 * 10 death of the testator. * The lord commissioner, when urged to reject the word "six," as an evident mistake in the number, and thus allow all the children to share in the bequest, said, "There are so many cases that tie up the operation of wills to their dates, that I cannot determine against them."

2. The general rule in regard to all bequests to a class is, that all who are embraced in the class, at the time the bequest takes effect, will be allowed to take. And consequently, as an interest devised under a will ordinarily takes effect at the death of

property should be divided among his sons, and the other half among his grandchildren, — that is, between the daughter of his deceased son and the children of his three other sons, — in equal proportions; and should either of the grandchildren have then deceased, his or her share to go to others of the same family, if any living; and if not, to their parents. The grand-daughter of the deceased son was held entitled to one-fourth. *Leland v. Adams*, 12 Allen, 286. See also *Amory v. Leland*, id. 281; *Houghton v. Kendall*, 7 id. 72. But the cases are considerably numerous where bequests to a class are, from some supposed purpose of the testator, gathered from the language of the will as applied to the facts, restricted to those known to the testator at the date of the will. *Scott v. Harwood*, 5 Madd. 332; *Singleton v. Gilbert*, 1 Cox, 68. Where the eldest son, or the one possessing the estate, is excluded from a distribution under a power, a younger son, becoming the elder, will be excluded under the description of elder sons, although especially named, as a younger son, entitled to share in the distribution. *Broadmead v. Wood*, 1 Br. C. C. 77; *Pierson v. Garnet*, 2 id. 38. The term "children" will not always include one in ventre sa mère. *Ibid.* Will not include grandchildren. *Robinson v. Hardcastle*, id. 344. Or great-grandchildren. *Mordecai v. Boylan*, 6 Jones, Eq. 365. Where one child is apportioned her full share in the estate, she will not be included in a general disposition of the residue to "the children" or "surviving children." *Tisdale v. Mitchell*, 13 Rich. 263, sed quære. What words sufficient to indicate an intent to restrict a class to those embraced in it at a particular period. *Doe v. Girard*, 1 Houston, Del. 276; *Richardson v. Raughley*, id. 561. Bequests to testator's "widow for life, to be divided among her children at her death, creates a vested interest in the children at the death of the testator and one dying before the widow, but, after the testator, its share will go to the personal representative of such child." *Conly v. Kincaid*, 1 Wins. Eq. 44; *Pickett v. Southerland*, id. 67; *Scott v. Moore*, id. 98. Where the testator devised his entire estate to his wife, for life, and, after her decease, to such of his children as should then be alive, it was held, that no interest vested in the children until the decease of the widow. *Carmichael v. Carmichael*, 4 Keyes, 346. See also *Hall v. Woolley*, 18 W. R. 129.

the testator, unless some other time be appointed for it to come into operation, it will be so regarded, and the class ascertained, as of that time.³ And thus it often occurs that by this natural and established construction after-born children are excluded; and many times, no doubt, when there may be probable ground to conjecture that they might have been intended by the testator to share in the bequest.³ And a posthumous child, or child in ventre sa mère, is for many purposes considered the same as any other child. Thus, a devise to such children of A. as shall be living at the time of his death, includes a child born after his death.⁴ The decisions upon this point are very numerous, and quite uniform in the principle upon which they profess to go, i. e., that bequests to a class will include all as participants, who are embraced in the class at the time the gift takes effect. Thus it has been held in the American courts, that where no time is fixed for the payment of a legacy to the children of A. it is due at the death of the testator, and only the children then in existence, including a child in ventre sa mère, can take.⁵ But where

³ *Davidson v. Dallas*, 14 Vesey, 576; *De Witte v. De Witte*, 11 Sim. 41; *Petway v. Powell*, 2 Dev. & Batt. Eq. 308.

⁴ *Doe d. v. Clarke*, 2 H. Bl. 399; *Rawlins v. Rawlins*, 2 Cox, 425; *Trower v. Butts*, 1 Sim. & Stu. 181.

⁵ *Jenkins v. Freyer*, 4 Paige, 47. See also *Gross's Estate*, 10 Penn. St. 360; *Weishaupt v. Brehman*, 5 Binney, 115; *Craighead v. Given*, 10 S. & R. 351; *Comfort v. Mather*, 2 Watts & S. 450; *Sorver v. Berndt*, 10 Penn. St. 213; *Phelps v. Phelps*, 28 Barb. 121. But see *Stires v. Van Rensselaer*, 2 Bradf. Sur. Rep. 172; *Lawrence v. Hebbard*, 1 Bradf. Sur. Rep. 252, where it is held, that in bequests to a class only those living at the date of the will can take, and that where any of these predecease the testator, the bequest goes to the survivors, but none born into the class after the date of the will can take. But these cases cannot be regarded as sound to the full extent. The American rule, in those states where the question has been most maturely considered, is the same as stated in the text. *Hawkins v. Everett*, 5 Jones, Eq. 42; *Walker v. Williamson*, 25 Ga. 549. Where the income of a fund, the principal of which is ultimately to be distributed among children as a class, is to be distributed as it accrues, those born into the class will share ratably in such income from the time of birth. *Simpson v. Spence*, 5 Jones, Eq. 208. In a somewhat recent case in New York (*Campbell v. Rawdon*, 18 N. Y. 412), it was decided, after argument by very eminent counsel, reversing the judgment below, that a devise to a class of persons of an estate in remainder, takes effect in favor of those who constitute the class at the decease of the testator, unless a contrary intent appear from the terms of the will, or extrinsic facts admissible in aid of the construction. But in *Knight v. Knight*, 3 Jones,

* 11 * there is a postponement of the payment of the legacy until a period subsequent to the death of the testator, every person answering the description at the time fixed for the division will be entitled,⁵ although not in esse at the death of the testator, unless there is something in the will to show that the testator intended to limit the legacy to such of the class as answered the description at the time of his death.⁵ And we believe these principles have generally been maintained in the American courts.⁶ Where there is a bequest to take effect after the expiration of an intervening estate also created by the will, after-born children will be held entitled, where the gift is to children as a class.⁷ *Wilde, J.*, here said: "The children of her body" meant "all the children she might have. This will not appear to be a strained construction of the words, when it is observed that as to part of the property the devise was prospective, it being of a remainder after a life-estate to the widow." It was therefore held, that as to the real property, the children living at the death of the testator took an estate in fee-simple, in the part where a life-estate was

* 12 secured to the widow, * or vested remainder, which opened to let in the after-born children, and, in the rest, a qualified fee, so limited as to admit the claim of the after-born children by way of executory devise, and the same estate in the personalty. The terms "all his children born or to be born," will not extend

Eq. 167, it was held that, where there is no intermediate estate, the class is ascertained at the decease of the testator; but if there be, at the termination of such estate. So also in *Wessenger v. Hunt*, 9 Rich. Eq. 459. And this, as before stated, seems to be the general rule. And the case of *Campbell v. Rawdon*, supra, does not seem to be at variance with it, since the class in that case was the "heirs" of a certain person already deceased; and being clearly defined, at the death of the testator, the remainder would vest in interest, although not in possession. In the recent case of *Dimond v. Bostock*, 23 W. R. 554, L. R. 10 Ch. App. 358, it was decided that the class must be ascertained as of the date of the decease of the testator, and very strong expressions of an intent to embrace others was held insufficient to control the presumed intent.

⁶ *Kilpatrick v. Johnson*, 15 N. Y. 322; *Swinton v. Legare*, 2 McCord, Ch. 440; *Cole v. Creyon*, 1 Hill, Ch. 311, 322; *Myers v. Myers*, 2 McCord, Ch. 214, 256; *Vanhook v. Rogers*, 3 Murph. 178. All in esse at the time the gift takes effect will be entitled to take as tenants in common. *Phene's Trusts*, Law Rep. 5 Eq. 346.

⁷ *Annabell v. Patch*, 3 Pick. 360. A child, born in due time after the decease of the testator, or the time fixed for determining the class, is regarded as entitled the same as if born before. *Hall v. Hancock*, 15 Pick. 255.

to a child not in being at the death of the testator.⁸ A child is regarded as in being from the moment of conception where that will be for its interest.⁹

3. There seems to have been considerable discussion in the books in regard to the precise meaning of the terms (as applied to children), "lawfully begotten" or "to be lawfully begotten," or "which shall" or "may be lawfully begotten," which have often been used in wills. The general tendency of the decisions has been in favor of regarding them all substantially of the same import, and as intended to signify nothing more than "legitimate."¹⁰ But where this, or any other form of expression is used to import children thereafter born, it will have that construction. But unless the language of the will reasonably imports that the bequest was exclusively for the children already in existence, the after-born children will be regarded as included.¹¹

4. It is said that where it is evident, from the will, that the testator intended to include all the children of the person named, as well those born after as before the bequest takes effect, no embarrassment attending the carrying the same into effect shall be regarded as sufficient reason for excluding children to whom there is a clear gift in the will. But where it is also provided that each child shall receive his share upon arriving at twenty-one, that provision shall be carried into operation, notwithstanding it may have the effect to abridge the share of an after-born child. Of two * repugnant provisions in a will the most convenient shall be * 13 executed.¹² We should feel sorry to be compelled to confirm,

⁸ *Burke v. Wilder*, 1 McCord, Ch. 551; *Sinkler v. Sinkler*, 2 Desauss. 127. All in existence at the time of distribution take in fee-simple, where such seems the purpose of the testator. *Deering v. Tucker*, 55 Me. 284.

⁹ *Hall v. Hancock*, 15 Pick. 255.

¹⁰ *Lomax v. Holmden*, 1 Ves. sen. 290; *Cook v. Cook*, 2 Vernon, 545; *Hewet v. Ireland*, 1 P. Wms. 426; *Wilkinson v. Adam*, 1 Vesey & B. 422; *Early v. Benbow*, 2 Coll. C. C. 342; *Sprackling v. Ranier*, 1 Dick. 344; *Storrs v. Benbow*, 2 My. & K. 46; s. c. 3 DeG., M. & G. 390; *Early v. Middleton*, 14 Beavan, 453; *Butler v. Lowe*, 10 Sim. 317. In this last case the bequest was to the children of the testator's nephews and nieces, "begotten or to be begotten," and it was held, that the children born after the death of the testator were not entitled to participate in the legacies.

¹¹ *Defflis v. Goldschmidt*, 1 Mer. 417; *Scott v. The Earl of Scarborough*, 1 Beavan, 154; *Doe d. Barnes v. Provoost*, 4 Johns. 61.

¹² *Defflis v. Goldschmidt*, 19 Vesey, 566.

as a general proposition, what has been often said by the English judges, that many of the general rules of construction which have been adopted by the English courts, and applied to the distribution of legacies, have very often resulted in defeating the intention of the testator; perhaps almost as often in some classes of cases, as it has resulted in carrying that intention into effect. On the contrary, we believe the American courts, in determining the construction of wills, have almost universally been governed by a leading reference to the intent of the testator, as gathered from the whole instrument. So that while the acknowledged fault of the English courts in this respect has been a too strict adherence to general rules of construction, that of the American courts has probably been a too ready yielding to the supposed intention of the testator, as indicated by the special circumstances of the particular case, to the disregard or setting aside of general rules of construction which would have led them in an opposite direction.¹³ Thus we may illustrate the vice of too strict construction by the rule adopted in *Hughes v. Hughes*,¹⁴ that where the residuum of an estate is given to all the children which shall be alive when the youngest child shall attain the age of twenty-one, and if any child shall have deceased, leaving a child or children, such child or children to receive the parent's share, this shall not allow the parent's share to go, by way of representation, to grandchildren, where the children have all deceased; thus following the letter of the will, to the obvious exclusion of the clear intent. And as there are many instances where the word "child" or "children" has been so construed as to include grandchildren, there would seem to have been the greatest possible reason why that construction should have been adopted in this case. It has often been held, we know, that grandchildren and great-grandchildren do not take as "children," except from necessity, or very clear intent, yet this

¹³ In confirmation of the foregoing propositions, we have only to allude to the cases already cited, where the terms, as applied to children, of "begotten or to be begotten," have been considered as having no reference to *after-born* children. This rule might have been founded in truth, in some of the early cases, in which the rule was first established; but in the majority of cases it would not be true. These terms are used more generally, it is believed, to include both the existing and after-born children. The rule, as held by the English courts, rests on policy more than justice.

¹⁴ 14 Vesey, 256.

case seems to be one of that character.¹⁵ In *Hill v. Chapman*,¹⁶ Lord *Thurlow* said of the early case of *Ellison v. Airey*:¹⁷ "This case, which I have often had occasion to consider, went upon a refinement, but cannot now be shaken." And his lordship further said: "If I enlarge the intention of the testator by imputing to him a view of providing for all the children, I shall contradict a rule which has stood too long to be shaken, but which, when first raised, went satis ex arbitrio, because the intention might go to all possible children, as in marriage settlements; and to impute to him such a restrained intention is rather a forced interpretation, and generally against the intention he conceived at the time."

5. It was established in *Wylde's case*,¹⁸ that a devise to one and

¹⁵ *Marsh v. Hague*, 1 Edw. Ch. 174; *Ewing v. Handley*, 4 Litt. 346; *Phillips v. Beall*, 9 Dana, 1; *Hone v. Van Schaick*, 3 Edw. Ch. 474.

¹⁶ 1 Ves. jr. 405, 408.

¹⁷ 1 Ves. sen. 111. The cases upon this subject are thus arranged by Mr. Sanders in his note to *Heathe v. Heathe*, 2 Atk. 121: "The general rule in cases of this nature seems to be, that where the devise or gift to the children is *general*, and not limited to a particular period, then it is confined to the death of the testator. *Northey v. Burbage*, Prec. Ch. 470; *Heathe v. Heathe*, supra; *Horsely v. Chaloner*, 2 Ves. sen. 83; *Isaac v. Isaac*, Amb. 348; *Congreve v. Congreve*, 1 Br. Ch. C. 530; s. c. cited in *Viner v. Francis*, 2 Br. Ch. C. 658; *Hughes v. Hughes*, 3 Br. Ch. C. 352, 354; *Hill v. Chapman*, id. 391. But where such devise or gift is to one for life, or where the distribution is postponed to a future time, then children born during the life or before that time are let in. *Harding v. Glyn*, 1 Atk. 470; *Graves v. Boyle*, 1 Atk. 509; *Haughton v. Harrison*, 2 Atk. 329; *Ellison v. Airey*, supra; *Attorney-General v. Crispin*, 1 Br. Ch. C. 386; *Congreve v. Congreve*, 1 Br. Ch. C. 530; *Devisme v. Mello*, id. 537; *Baldwin v. Karver*, Cowp. 309; *Andrews v. Partington*, 3 Br. Ch. C. 401; *Pulsford v. Hunter*, 3 Br. Ch. C. 416. It seems that under a devise to children *living* at the testator's death, a child in ventre sa mère shall take. *Hale v. Hale*, Prec. Ch. 50; *Beale v. Beale*, 1 P. Wms. 245; *Millar v. Turner*, 1 Ves. sen. 85; *Clarke v. Blake*, 2 Br. Ch. C. 320. See contra, *Piereson v. Garnett*, 2 Br. Ch. C. 38; *Cooper v. Forbes*, 2 Br. Ch. C. 63."

¹⁸ 6 Co. 16. But in the late case of *Grieve v. Grieve*, Law Rep. 4 Eq. 180, where the devise was to two persons and to their children, and if they have not any then over, "the furniture to go with the house," these persons had no children at the date of the will, but both had children born afterwards, and it was held the rule in *Wylde's case* was not inflexible, and that the gift of the furniture was a sufficient reason for not vesting estates-tail in the parents; but that they took estates for life with remainders to the children of each, as they successively came in esse. And a bequest to A. and the children of B., naming

* 15 * his children should carry an estate in joint-tenancy, where the person named had children living at the date of the will, but that where no such children existed, the term "children" should be construed as a word of limitation, and as equivalent to children of his body, thus creating an estate-tail general as to real estate.

6. This involves the germ of a principle upon which a very numerous class of cases has been decided by the courts of equity, based upon Sir *James Wigram's* third proposition.¹⁹ Thus, in a considerable number of cases, where legacies have been given to a class of persons described by the name of the relation of that class, either to the testator, or some other person named, or to some other class of persons designated, and upon inquiry into the surrounding facts, it is ascertained that no persons, strictly corresponding to the relation named, existed at the date of the will, and this was well known to the testator at the time of using the terms, it has been permitted, partly from necessity, in order to give the testator's words any meaning, and partly from conjectural and probable intention, gathered from the other portions of the will, as well as from the surrounding circumstances, to apply the words to other persons coming the nearest to the primary import of the terms used, and also to the presumed intention of the testator, taking all the allowable extrinsic aids into the account.

7. The word "children," as well as all other similar descriptive terms of classes or relations, it will be borne in mind, must always be understood in wills, in its primary and simple signification, where that can be done; in short, where there are any persons in existence at the date of the will, or before the devise or legacy takes effect, answering the meaning of the term.²⁰

them, may be construed to give A. one moiety, and the children of B. the other. *Hoxton v. Griffith*, 18 Gratt. 574; *Jackson v. Coggin*, 29 Ga. 403. See also *Valentine v. Borden*, 100 Mass. 273.

¹⁹ *Wigram on Extrinsic Evidence*, 42. "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are insensible, with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible, in any popular or secondary sense, of which, with reference to these circumstances, they are capable." Ante, vol. 1, § 41, where the subject is extensively discussed.

²⁰ *Duhamel v. Ardovin*, 2 Ves. sen. 162. Here the word *enfants*, in French,

* 8. And where the term "children" has received a larger * 16 and more extended construction, as synonymous with issue, it has generally been based upon something in the will,²¹ unless it resulted, as already intimated, from the fact that there were no children in existence. And where, from the construction of the whole clause, it can be made to appear, that the testator meant,

was held synonymous with "children;" and where a residuum was given, upon failure of children, it was held not equivalent to failure of issue, since that would render the bequest void for remoteness, and a court will never give any term in a will a secondary signification, where the result will be to defeat the purpose of the testator. *Crooke v. Brookeing*, 2 Vern. 107. Bequest to all the children of E. held only to embrace such as were born before the decease of the testator, and so saving the bequest from failing for remoteness. *Elliott v. Elliott*, 12 Sim. 276. But in general such terms will be held to include all born before distribution. *Clarke v. Clarke*, 8 Sim. 59; *Balm v. Balm*, 3 id. 492. But, as stated ante, note 1, those born after the time of distribution must be excluded. *Paul v. Compton*, 8 Vesey, 375; *s. p. Middleton v. Messenger*, 5 id. 136; *Walker v. Shore*, 15 id. 122; *Tebbs v. Carpenter*, 1 Madd. 290; *Buckle v. Fawcett*, 4 Hare, 536. In bequests to the younger children of A., held that a younger child, who had become the oldest by the death of an older, was not entitled, but the estate would go to an only younger child. *Lincoln v. Pelham*, 10 Vesey, 166; *Bowles v. Bowles*, id. 177. And this rule of construction must be pursued, when the terms of the will are explicit, notwithstanding the elder is excluded under it for a reason which does not apply to a younger child becoming an older by the decease of another still older. *Livesey v. Livesey*, 13 Sim. 33. But see *Thompson v. Thompson*, 1 Coll. C. C. 387. A power to appoint among children will not embrace grandchildren so long as there are children capable of taking. *Carson v. Carson*, 1 Phillips, Eq. 57; *Robinson v. Harcastle*, 2 Br. C. C. 344. But in the late case of *Prowitt v. Rodman*, 37 N. Y. 42, a bequest to the mother, and after her death to such of her children as should be living at the time of her death, and for want of such, then over, was construed to embrace grandchildren as well as children, and to be synonymous with "issue," upon the ground of the presumed intention of the testator not to have the gift over take effect except for want of issue living at her decease. But see *Hopson v. Commonwealth*, 7 Bush, 644. It seems pretty obvious that grandchildren whose parent is living and capable of taking the bequest cannot also take under the term "children;" but, when the parent has deceased, the grandchildren are often admitted to take the parent's share by representation, on the presumed ground of intention. *Feit v. Vanata*, 21 N. J. Eq. 81; *Scott v. Gurnsey*, 48 N. Y. 106. But this rule is by no means general. *Thompson v. Ludington*, 104 Mass. 193.

²¹ *Wythe v. Thurlston*, Amb. 555. The form of expression was, "but if any one be dead at that time, to be equally divided among the survivors of them, and their respective children, in case any of them be dead having issue of their body;" clearly showing that the word "children" was used as synonymous with "issue." Lord *Hardwicke* said, "The word 'issue' will carry

by "children," to include children and the issue of such children as were deceased, that construction will be adopted.²² Hence the term "children" has been held to include, in that way, all the descendants of the person named.²² And there are numerous American cases wherein it has been held that grandchildren and great-grandchildren will take under a bequest to children, whenever that is necessary in order to give effect to the words of the will, or that appears to have been the evident intention of the

* 17 testator.²³ Lord *Alvanley*, M. R., in *Reeves v. Brymer*,²⁴ said: "Children may mean grandchildren, where there can be no other construction, but not otherwise." And the same learned judge adopted the view that children included all the descendants, rather than admit a construction which must result in intestacy.²⁵

9. There has been some question whether the term "grandchildren" could be held to include great-grandchildren. It has been held, that where there was any thing in the will to show

it to all the descendants." *Gale v. Bennet*, Amb. 681 goes upon the same principle. To extend the word "children" to embrace issue, it must appear by the context to have been so used, or else that the bequest will otherwise fail. *Brokaw v. Patterson*, 18 N. J. Eq. 194.

²² *Royle v. Hamilton*, 4 Vesey, 437.

²³ Ante, note 15; *Izard v. Ex. of Izard*, 2 Desauss. 308; *Smith's Case*, id. 123, n.; *Phillips v. Beall*, 9 Dana, 1; *Hone v. Van Schaick*, 3 Edw. Ch. 474; *Pemberton v. Parke*, 5 Binney, 601. So also in the American cases. The case of *Hone v. Van Schaick*, 3 N. Y. 538, presents numerous nice questions in regard to the construction of legacies to children and grandchildren, where the decree of the Chancellor, 3 Barb. Ch. 488, is reversed, and that of the Vice-Chancellor affirmed. The opinions of the Chancellor, and of the Court of Appeals by *Gridley, J.*, are of marked interest and ability, as affecting this question; that of the Chancellor being, upon the whole, the most liberal, and that of the Court of Appeals the most critical, but, at the same time, rather the most satisfactory. The general principles adopted in both are the same as stated in the text.

²⁴ 4 Vesey, 692, 698.

²⁵ *Royle v. Hamilton*, 4 Vesey, 437, 439. In *Radcliffe v. Buckley*, 10 Vesey, 195, Sir *William Grant* holds, that "children" may include other more remote descendants, where the will would otherwise become inoperative, or where by the testator's use of other words in the will it is made apparent that the word "children" was used, not in the proper, but in a more extensive sense. But in *Moor v. Raisbeck*, 12 Sim. 123, the Vice-Chancellor, *Shadwell*, held that this necessity must clearly exist, or the word could not be construed in such secondary sense. And there must be special and satisfactory grounds, to justify a departure from the primary import of the word "children." *Jackson v. Staats*, 11 Johns. 337, 351; *Hallowell v. Phipps*, 2 Whart. 376.

that the testator spoke of these two classes indiscriminately as "grandchildren," both should be included under the term "grandchildren."²⁶ But unless there is something in other portions of the will, or in the surrounding circumstances, admissible in aid of the construction, which indicates, with reasonable certainty, that the word is used in a more extended sense than its ordinary *import or there would otherwise be an entire *18 failure to give the clause any operation, we apprehend the word "grandchildren" must be restricted to its primary and ordinary signification.²⁷

10. And in the case of a legacy to the children of any one by name, who at the time of the gift had no children, but only grandchildren, although there might arise some degree of probability that the testator intended the grandchildren to receive the legacy, yet it has been questioned how far such probability will justify the courts in departing from the primary signification of the word, since the person named may have children born after the date of the will, or even after the death of the testator, or where the time of vesting is deferred, before that time arrives, *all* of whom, in such case, would be entitled to claim the bequest.²⁸ In the last case, the question arose in regard to illegitimate children taking by the general description of "children," the person named having no other, either at the date of the will or the death of the testator.²⁹ We shall have occasion to consider this point more hereafter, as regards illegitimate children.

²⁶ *Hussey v. Berkeley*, 2 Eden, 194, 196; s. c. nom. *Hussey v. Dillon*, Amb. 603. The Lord Chancellor here says: "As to great-grandchildren, I incline to think that the word 'grandchildren' would, without further explanation, comprehend them; for in common parlance, which is the true way of interpreting words in a will, the word 'grandchildren' is used rather in opposition to and as exclusive of children, than as confined to the next descent, — the children of children, — and must, I think, have the effect of comprehending both, unless the intention appear to the contrary."

²⁷ *Earl of Orford v. Churchill*, 3 Ves. & B. 59.

²⁸ *Harris v. Lloyd*, Turn. & Russ. 310.

²⁹ In *Harris v. Lloyd*, *supra*, the learned judge said: "I have not the least doubt that this testator meant illegitimate children, but I am clearly of opinion that there is not enough, upon the face of this will, to authorize me to carry that intention into effect." *Cartwright v. Vawdry*, 5 Vesey, 530; *Swaine v. Kennerley*, 1 Ves. & B. 469. The proposition of the learned judge is scarcely maintainable, as we may show hereafter.

11. We will here indicate what seems to us to be the latest determination of the English courts of equity, upon this and all the analogous questions.

(1.) The terms "children," "grandchildren," "nephew," "niece," "cousin," or any similar term, must ordinarily be presumed to have been used in its primary and natural sense; and this sense cannot be enlarged or qualified, so as to admit any person not coming within such primary meaning, unless there be something upon the face of the will clearly indicating such intent in the mind of the testator, at the time of making his will, or unless such qualified or enlarged sense of the term may be gathered, with reasonable certainty, to have been the intention of the testator, either from the necessity of so construing it, in order to give it any operation, or from some other reasonably satisfactory probability, arising out of the state of facts existing at the
 * 19 date of * the will, and which are of a character to be properly admissible in aid of the construction of the will.³⁰

³⁰ 2 Story, Eq. Jur. § 1065 c, where we took occasion to classify the more recent decisions upon this somewhat perplexing question, thus: "In a recent case before the Lord Chancellor, after a good deal of examination and discussion at the bar, it was held that a bequest to 'cousins,' simpliciter, includes first cousins only, in the absence of any thing to explain the meaning of the testator. The Lord Chancellor said: 'I think that if a testator says no more than that he gives to "cousins," he must be taken to mean first cousins. That will be a practical construction, and one by which the parties entitled will be easily ascertained; it coincides, too, with ordinary experience, for when a person speaks of cousins, he generally means first cousins, — the children of an uncle or aunt; — and I think that in the present case, there being first cousins (and nothing to indicate that any others were intended), this is the proper construction to adopt.' It seems to us this view, as a general exposition of the difficulty, is extremely satisfactory. *Stoddart v. Nelson*, 6 DeG., M. & G. 68; *Stanger v. Nelson*, *ibid.* The counsel, in arguing the extension of the term 'cousins,' so as to include all persons coming within the general import of the term, referred to the following cases: *Caldecott v. Harrison*, 9 Sim. 457; *Sanderson v. Bayley*, 4 My. & Cr. 56; and *Williams on Exrs.* vol. 2, p. 885, 3d ed. See also *Thompson v. Robinson*, 5 Jur. n. s. 1196. The same construction was given to the word 'niece.' *Crook v. Whitely*, 7 DeG., M. & G. 490. See also *Pride v. Fooks*, 3 DeGex & Jones, 252; *Jenkins v. Lord Clinton*, 26 Beavan, 108; *Smith v. Lidiard*, 3 Kay & J. 252. And in order to enable illegitimate children to take under a bequest to 'daughters,' it would seem to be requisite to show that there were no other persons who could answer the description, and that their reputed character did answer it, and that this was understood by the testator, which last fact

(2.) It is apparent, from a careful examination of the more recent decisions of the English courts of equity, that they adhere with great strictness and pertinacity to any rule of construction, when once established, although it may lead them quite one side of the obvious intention of the testator. In the American courts, probably, no such persistent adherence to the strict and literal application of the recognized canons of construction, to every case, has yet been arrived at, as a general thing. Particular instances of that kind may occur. But, in general, it will be found, that the American courts depart, with some degree of reluctance, from what is the obvious and unquestionable meaning of the testator, * where so expressed as to be intelli- * 20 gible without resort to inadmissible evidence. In the case of *Edmunds v. Fessey*, already referred to, Sir *John Romilly*, M. R., a very learned and experienced equity judge, felt bound to exclude illegitimate children wherever there were legitimate children answering the description. The result of the application of this rule to the particular case was, to admit an illegitimate daughter, there being no other daughter, and to exclude the illegitimate son, there being more than one legitimate son, — thus meeting the words of the will, “sons and daughters” of A. B., — the learned judge thus apologizing for the “anomalous result:” “The result is necessarily somewhat anomalous, for I admit one of the illegitimate children, and exclude the other. It is to be observed that there are two legitimate sons, sufficient to satisfy the word ‘sons’ in the plural. I regret the decision to which I feel myself obliged to come, because it is evident that the testator intended to include all the children of his cousin, whether legitimate or illegitimate.”

(3.) We believe it is safe to conclude that an American court would, under such circumstances, without hesitation, have included all the illegitimate children, and as it seems to us, upon the best established and most unquestionable rules of construction, as applicable to wills; that where the testator has used the word in

will not be inferred. *Herbert in re*, 6 Jur. N. S. 1027; s. c. 1 Johns. & H. 121. How far illegitimate children, or their children, shall take, by general description, is matter of intention. *Allen v. Webster*, 6 Jur. N. S. 574; 2 Giff. 177. But illegitimate children, born after the date of the will, cannot take by general description, as ‘such other child that may be born of my house-keeper,’ &c. *Medworth v. Pope*, 5 Jur. N. S. 996; ” 28 L. J. Ch. 905; s. c. 27 Beav. 71; *In re Ayles’ Trusts*, L. R. 1 Ch. Div. 282.

question, or its equivalent or correlative, in the course of the same instrument, in a particular sense, it is admissible to give it that construction throughout the instrument, where that seems best to conform to the probable intent of the testator, in the particular place in question. The fair application of this rule, which is as well established, and of as controlling a character, as any other, would have enabled the learned judge to escape the "anomalous result" which he seems so much to deplore, and at the same time to meet the acknowledged justice and truth of the case, which is always a most gratifying result upon all subjects, and one in regard to the determination of causes in courts of justice, which, if it is not reached, must always operate, in some degree, either as an impeachment of the law, or of the competency of the court in its administration, either of which we should always feel reluctant to admit.³¹

* 21 * (4.) We think, too, that it is safe to affirm, that no court would be required to go into all possible conjectures, in regard to the occurrence of future events, which might give the words of the will an intelligible signification, and to be able to exclude all such conjectural states of fact, before any secondary sense of the words of the will can be admitted. We should therefore dissent from the view, that in order to extend the term "children" to include those of another generation, or those not legitimate, it must be shown, that at the time the testator used the term "children" of A. B., the father had deceased, and had left no children legitimate, but only grandchildren, or illegitimate children, as has been urged by some writers of great authority upon this subject.³² All that

³¹ We do not intend here to imply, that many cases do not occur, where, from some mistake or defect in the will, it may become impracticable, without the violation of acknowledged principles of law, to reach the intent of the testator, and the justice of the case. As in *Drake v. Drake*, 8 Ho. Lds. Cas. 172, where the name and the description of the person in the will cannot be made to apply to the same person, but really identify two persons, with equal certainty, it not being a case of equivocation, direct evidence of intention is not admissible. And unless some preponderance of probability of intent can be reached by way of construction, the name must prevail over the description, without regard to the probability of which would be most likely to be mistaken in the particular case. But see *contra*, vol. 1, p. 592, n. 26.

³² 2 Jarman (ed. 1861), 136. It is here said that the extended construction of these terms will only be allowable, when "otherwise the gift *never* could have an object." It is obvious that even the case of *Edmunds v. Fessey*,

reason, and the generally received rule of law upon the subject, would seem to require, in order to give the words a secondary import, is that it should appear that the testator was aware, at the date of his will, that the term "children," or any similar term, used by him, could have no strict, literal, and technical application to the existing facts. And this knowledge it has been held must be proved, and cannot be presumed.³³

(5.) And it seems that in general, where the word "children" is so construed as to include other descendants, it will be held to include all the descendants, as being synonymous with "issue."³⁴ But there will occur many cases where the testator will give evidence, by the language used in his will, or in other ways coming legitimately within the limits of aiding the construction of the * words used, that while he intends "children" to include * 22 "grandchildren," he does not intend it shall have a wider extension.³⁵ And this same indefiniteness of extension, when once it is allowed to go beyond its literal import, will apply, to some extent, to other relative terms, such as "nephew," "niece," "cousin," &c.

(6.) It seems to be well settled, as a general rule, that the construction of the words of a will cannot be affected by the occurrence of contingencies, not in the mind of the testator, either at the time of making his will, or before his death.³⁶ For as no one can

already alluded to, and where the construction adhered to was inconveniently nice, fell far short of the strict rule for which Mr. Jarman here contends.

³³ *Crook v. Whitley*, 7 DeG., M. & G. 490, 496, by Lord *Cranworth*.

³⁴ *Pride v. Fooks*, 3 DeG. & J. 252, 275; Lord *Cranworth* in *Cook v. Whitley*, 7 DeG., M. & G. 490, 496.

³⁵ *Fenn v. Death*, 23 Beavan, 73.

³⁶ *Pride v. Fooks*, 3 DeG. & J. 252, 275. This rule of construction is one of very general application to wills. Hence in aid of the construction of the will in general, we can only introduce extrinsic evidence to show the state of facts and of the testator's knowledge, at the time of making the will. But as for most purposes the words of the will speak from the death of the testator, and the instrument is merely inchoate and ambulatory, until that time, it may often afford some aid in conjecturing the sense in which the testator expected his will to be received, by showing the surrounding facts and the state of the testator's mind and knowledge up to the time of his death. But in the case of *Sherratt v. Mountford*, 21 W. R. 818, s. c. L. R. 8 Ch. App. 928, before the Lords Justices in the Court of Chancery Appeal, where the testator made a bequest to his nephews and nieces, not having any such by consanguinity, it was held his wife's nephews and nieces, being the nephews and nieces of the husband in a secondary sense, might take, there being no others more nearly meeting the words

know, with certainty, what the testator might have been disposed to do, in a state of facts not presented to his mind, so also, if that could be known, no court would be justified in making a new, or unmaking the existing instrument, which must speak by its own words, and be applied, by the courts, to such facts as may occur, not with the purpose of meeting what the testator might have done, had a different apprehension of future events been presented to his mind, but upon the basis of what he did do, as applicable to all possible, as well as supposable, contingencies thereafter to occur. For every testator must be aware that he makes his will with reference to all possible future contingencies, whether in fact present to his mind or not.

12. The foregoing rules of construction, in regard to the word "children," will generally apply to the word "nephew or niece."³⁷ And a bequest to "second cousins" was held to be applicable only to such as had the same great-grandfather or great-grand-mother, * and not to first cousins once removed.³⁸ But there are many other cases where no such distinction was attempted to be maintained, and we very much question whether any such nice distinction can be made fairly to apply to the loose forms of expression in common use in regard to cousins. Except as to first cousins, as a general thing, no distinction is commonly made in regard to the grade of other cousins.³⁹

of the will. But evidence as to the terms on which the testator was with the nephews and nieces of his wife was held not admissible, the evidence being that he was on bad terms with them, and treated them with coldness. But evidence that he was well acquainted with them, and accustomed to call them nephews and nieces, as tending to show in what sense he had been accustomed to apply the words of the will, probably would have been admissible, according to the decided cases. Ante, vol. 1, § 41. But, where there are persons meeting the words in the primary sense, the cases all agree that they must take, and no evidence is admissible to vary that result.

³⁷ *Shelley v. Bryer*, Jacob. 207. Here the residue was given in the will to "nephews and nieces." By a codicil the testator gave a great-niece £500, calling her his "niece." But the court held that was not sufficient ground to admit her to share with nephews and nieces in the residue. And the words "first cousins or cousins-german" cannot be extended to include the descendants of first cousins, or second cousins. *Sanderson v. Bayley*, 4 My. & Cr. 56. See also *Hone v. Van Schaick*, ante, note 23. See also *Blowers' Trusts*, L. R. 11 Eq. 97; s. c. 6 Ch. App. 351.

³⁸ *Bridgnorth v. Collins*, 15 Sim. 538.

³⁹ *Mayott v. Mayott*, 2 Br. C. C. 125; *Silcox v. Bell*, 1 Sim. & Stu. 301;

13. And the same rule will apply to the admission of illegitimate children, under the general denomination of "children." They can only come in after they have been recognized, and acquire the reputation of being the children of the person named.⁴⁰ There must also be no other person or persons to answer the terms used in the will.⁴¹ And it has even been held, that where the will gives a residue to all the children of the testator's sons, J. and W., and of his daughter Sarah, one of the sons having no children except an illegitimate daughter, that she cannot take.⁴² And in *Fraser v. Pigott*,⁴³ Lord *Lyndhurst*, Ch. B., held, that even where the will showed that the testator recognized the illegitimate children of his son William, by making a bequest to the children of his sons, "whether born in wedlock or not," nevertheless the gift of the residue of the estate to and among all the children of his said sons, as tenants in common, would not carry any thing to the illegitimate children of such sons as had legitimate children, but that the bequest was to the legitimate children of such as had both, and to the illegitimate children of such as had no other. This latter decision seems to be at variance with that of *Bagley v. Mollard*, and to rest upon the

Charge v. Goodyer, 3 Russ. 140. The term "cousins" has been very differently interpreted by different courts. In *Caldecott v. Harrison*, 9 Sim. 457, Sir L. *Shadwell* said, "I admit that the word 'cousins,' if used simpliciter, would include cousins of every description." But in the case then in hand the learned Vice-Chancellor felt constrained to give the term a more restricted operation. The form of bequest here was, "to all my cousins both on my father's and mother's side, as may be living at the time of my decease," and to the children of such as may have then deceased. It was held to extend only to first cousins, and the issue of such as had deceased. And in *Stoddart v. Nelson*, 6 DeG., M. & G. 68, 71, as before stated, Lord *Cranworth* held that "cousins" meant only first cousins.

⁴⁰ *Wilkinson v. Adam*, 1 Vesey & B. 422, 454. No extrinsic evidence can be received, in such a case, to show the intention of the testator, except to show that such persons have acquired the reputation of being the children of the person named. *Ibid.*; *Dorin v. Dorin*, L. R. 17 Eq. 463.

⁴¹ *Lord Woodhouselee v. Dalrymple*, 2 Mer. 419.

⁴² *Bagley v. Mollard*, 1 Russ. & My. 581; *Harris v. Lloyd*, T. & Russ. 310.

⁴³ 1 Younge, 354. This case is questioned by *Shadwell*, V. C., in *James v. Smith*, 14 Sim. 214, 216: "I entertain great respect for the opinion of the learned judge who decided the case of *Fraser v. Pigott*, but I must say I do not think it was rightly decided." From all which it is obvious that the English courts, in admitting or rejecting the claims of illegitimate children to bequests for children, have not proceeded upon any well-defined rule.

same basis as *Edmunds v. Fessey*,⁴⁴ already noticed. We conclude, therefore, that the rule which we have already intimated, as the governing one in this class of cases, may be fairly regarded as having the sanction of the English courts; viz., that where the provisions of the will show that the testator uses the word "children" to include both legitimate and illegitimate children, although not of the same person, it is fair to conclude such was his understanding of the force of the word, and therefore, wherever he uses it, in a general form, he does intend to include all the children of the person named, whether legitimate or not, if generally reputed and recognized as the children of that person.⁴⁵

⁴⁴ Ante, vol. 1, 604, 655; vol. 2, p. 20.

⁴⁵ *Evans v. Davies*, 7 Hare, 498; *Meredith v. Farr*, 2 Y. & Coll. 525; *Owen v. Bryant*, 2 DeG., M. & G. 697; *Hartley v. Tribber*, 16 Beav. 510; *Worts v. Cubitt*, 19 Beav. 421. And where the bequest is to the "children" of one having one legitimate and one illegitimate child, it has been held that both will take, since otherwise it is impossible to meet the word "children" in the plural. *Gill v. Shelley*, 2 Russ. & My. 336; *Leigh v. Byron*, 1 Sm. & Giff. 486. But see *Gabb v. Prendergast*, 1 K. & J. 439. See also *Wilkinson v. Adam*, 1 Vesey & B. 422; s. c. affirmed in Ho. Lds. 12 Price, 470; *Blundell v. Dunn*, cited 1 Madd. 433; *Owen v. Bryant*, 2 DeG., M. & G. 697; *Hartley v. Tribber*, 16 Beav. 510; *Worts v. Cubitt*, 19 id. 421. The English courts adhere with great strictness to their former doctrines, excluding illegitimate offspring from taking under bequests to children. But it seems that where the mother of such children has no other, the word "children" will be sufficient to designate such offspring; as where an unmarried woman gave by will her property to her children, and in a codicil described them by name, they were held entitled to take. *Clifton v. Goodburn*, Law Rep. 6 Eq. 278. And where the mother of illegitimate children, described in the will by her maiden name, received a bequest to her "and her two youngest daughters," it was held sufficient description for them to take. *Savage v. Robertson*, Law Rep. 7 Eq. 176; s. r. *Clifton v. Goodburn*, supra. But where the testator gave a fund to his daughter M. for life, and after her decease to all her children, begotten or to be begotten, in equal shares, M. having four children, at the time of the testator's death, by A., whom the testator believed to be M.'s lawful husband, and after testator's death M. having had three more children by A., and the marriage between M. and A. proving to have been unlawful, it was held, that the children born before the testator's death took under the will, but that those born afterwards did not. *Holt v. Sindrey*, Law Rep. 7 Eq. 170. But see *Crook v. Hill*, 17 W. R. 1092; *Howarth v. Mills*, post, n. 47. See also *Lepine v. Bean*, L. R. 10 Eq. 160; *Crook v. Hill*, L. R. 6 Ch. App. 311; L. R. 6 Ho. L. 265; *Pard v. Children*, L. R. 12 Eq. 16; *Ouleston v. Fullalove*, 21 W. R. 783; *In re Brown's Trusts*, L. R. 16 Eq. 239. But in the later stage of *Ouleston v. Fullalove*, L. R. 9 Ch. 147, the full Court of Appeal, the Lord Chancellor *Selborne* dissenting, and on great consideration, held that where

* 14. And where the testator gave a bequest "to my chil- * 25
dren," he having never married, it was held proper to receive
parol evidence to show that he recognized and considered certain
persons as his children, and that they were generally so reputed.⁴⁶

the intent was clear to provide for illegitimate issue of the testator, born after the date of the will, but before the death of the testator, there was no rule of policy which would preclude the courts from giving effect to such intent. *s. p. Goodwin's Trusts*, L. R. 17 Eq. 345. But in *Dorin v. Dorin*, Ho. Lds. 23 W. R. 570, L. R. 7 Ho. Lds. 568, it was held that mere intent was not sufficient to embrace illegitimate offspring under the term "children." There must be a necessity to adopt that construction, in order to escape some otherwise marked incongruity; as, for instance, to give it any meaning. Lord *Selborne* here said: "I am by no means sure that the law would not be in a better state than it is at present if the word 'children' in a will were regarded as large enough, when used by the testator concerning children by a particular woman, to include within its proper and prima facie construction any children living at the date of the will who might be recognized by the testator as being his own by that woman, as well as those who might afterwards be procreated between them in lawful marriage." The learned judges all seem to agree that in this case the testator evidently intended to embrace his illegitimate as well as his legitimate children by the woman whom he had married after the birth of the former, and that this intent is apparent from the words of the will with reference to existing facts at its date. We would therefore sooner adopt the decision of the Vice-Chancellor than that of the House of Lords reversing it. It has been held, that a statute enabling illegitimate children to inherit does not enable them to take under the designation of "children" in a will; but that such term must receive the same construction as before the statute, limiting it to legitimate children, since that is the only proper import of the term. *Thompson v. McDonald*, 2 Dev. & Bat. Eq. 463, which seems a somewhat strict construction. And where the testator, being one of two illegitimate children of the same parents, devised certain land to his mother by name, and to her children for ever, and by a subsequent clause made a bequest to his sister, the other illegitimate child, by name, it was held the devise to the mother and her children did not embrace the illegitimate daughter. *Shearman v. Angel*, Bailey, Eq. 351.

The law of Louisiana is very severe in reprobation of the state of natural children, and will not uphold any provision for them, beyond that of mere alimony or maintenance. *Bennett v. Cane*, 18 La. Ann. 590.

Adopted children by a man do not become the children, or quasi children, of the wife; but only of the person adopting them. *Barnes v. Allen*, 25 Ind. 222.

⁴⁶ *Beachcroft v. Beachcroft*, 1 Madd. 430. Mr. Williams, 2 Exrs. 990, in note, says, this case "has been treated as overruled. *Overhill's Trust*, 1 Sm. & G. 362." But we are sure it was decided upon the most unquestionable grounds, and is so held by the present Lord Chancellor in *Dilley v. Matthews*, 11 Jur. n. s. 425. But the same rule will not apply where there are legitimate

It has been said that natural children in ventre sa mère cannot take under the description of children of the testator or of any other man.⁴⁷ But there is no reason why any such impediment should * be interposed in the way of making provision for such offspring, unless where the bequest is made dependent upon the fact of paternity, which would raise an inconvenient and offensive issue, and one which a court of equity would probably decline to determine, for any such purpose.⁴⁷

children. *Cartwright v. Vawdry*, 5 Vesey, 530; *Osmond v. Tindall*, 5 Vesey, 534 c, in note; *Godfrey v. Davis*, 6 Vesey, 43; *Mortimer v. West*, 3 Russ. 370; *Dover v. Alexander*, 2 Hare, 275; *Overhill's Trust*, 1 Sm. & G. 362. See also *Woodhouselee v. Dalrymple*, 2 Mer. 419; *Bayley v. Snelham*, 1 Sim. & Stu. 78.

⁴⁷ *Metham v. Duke of Devon*, 1 P. Wms. 529. But in this case his lordship, Chancellor *Parker*, seems to have been influenced in construing a bequest to all the testator's sons natural children by Mrs. Heneage, by the consideration that the father could not have intended after-born children, since that would be to encourage his vicious mode of life; and that even one in ventre sa mère could not be included, since, it not being the child of any one, could not take as such until it had acquired such a reputation. This is, undoubtedly, very sound policy, good morality, and strict law; but it is so far from the plain matter-of-fact way of viewing all subjects in this matter-of-fact country, that we do not apprehend it will finally be able to maintain much foothold here. The statutes of most of the states have already swept away all pretence of any such construction. And where the statutes do not control the matter, we should expect the courts to repudiate all such unnatural refinements. But the English courts have extended the same rule to the after-born offspring of a man with his deceased wife's sister, there having been a formal marriage of the parents, which is held void under the English law. Such after-born children cannot take under the will of the mother, describing them in the most perfect mode, so as to leave no question of the intent. The bequest is held inoperative as against good morals and sound policy. *Howarth v. Mills*, 12 Jur. n. s. 794; s. c. Law Rep. 2 Eq. 389.

And the English courts have virtually repudiated the principle, by holding that a bequest to the child of which the mother of a natural child is enceinte, without reference to any person as the father, may be upheld. Sir *William Grant*, in *Earle v. Wilson*, 17 Vesey, 528-532. But the learned judge here held, that, according to earlier authorities, where the bequest was based upon the recognition of a natural child, as that of the testator or of any other man, in ventre sa mère, the bequest could not be upheld. Co. Litt. 3 b.

But in *Gordon v. Gordon*, 1 Mer. 141, 148, 149, Lord *Eldon*, Chancellor, explains the true ground of the former decisions, viz.: That if the bequest is made in any sense dependent upon the fact of the child being that of the testator, or of any other man, it cannot take effect, since the court will not suffer that inquiry to be gone into for that purpose. And this will apply as well to the case of a natural child after as before birth. But where a bequest is made to

15. There is a somewhat numerous class of cases coming within the same principle above alluded to, where legacies have been given to one in the character of wife or husband, either of the donor or of some other person. The principle adopted in these cases has been, to discriminate between those cases, where the term is used merely as descriptive of the person, and those where it is made the foundation or motive for the gift. In the latter case it is held that the bequest must fail, where the character has * been assumed, fraudulently, or in such a way as to impose * 27 upon the testator, and thereby to induce him to make a gift, which he otherwise probably would not, or might not have done. The case of *Kennell v. Abbott*⁴⁸ is a leading one upon this subject, where the Master of the Rolls, Sir *R. P. Arden*, discusses the reason of the rule very much in detail. By the civil law it seems that a false reason assigned for giving a legacy will not defeat it, unless there is such fraud as to make it appear probable, that if the testator had known the facts he would not have given it.⁴⁹ And the learned judge here adopts substantially the same distinction. This was a case where a legacy was given to a man, by a woman upon whom he had practised a fraud, in representing himself as an unmarried man, and as such consented to marry her, and whom she regarded as her husband, and accordingly gave him the legacy, but who in fact had a prior wife living. The court in respect of this conduct held him not entitled to the legacy; but inclined to think the case would be otherwise where the mistake in the description did not occur from any fault or misconduct of the legatee, as where a testator gives a legacy to a child, from motives of affection, supposing it his own, but is imposed upon in that respect.⁵⁰ And where a legacy was given to Lady C., the

a natural child, even in ventre sa mère, upon the belief that it is the testator's child, or that of any other person, this will not affect the validity of the bequest, provided the person to take is sufficiently identified. And in that respect there is no more difficulty in identifying an unborn natural child than any other unborn child. The opinion of Lord *Eldon* is exceedingly satisfactory, in regard to the former difficulties which were supposed to embarrass this subject. See also *Evans v. Massey*, 8 Price, 22; *Dawson v. Dawson*, Madd. & G. 292.

⁴⁸ 4 Vesey, 803.

⁴⁹ Digest, lib. xxxv. tit. 1, l. 72, § 6. "Falsam causam legato non obesse verum est; quia ratio legandi legato non cohæret; sed plerumque doli exceptio locum habebit, si probetur alias legaturus non fuisse."

⁵⁰ The learned judge here says, "Neither would I have it understood that if a testator, in consequence of supposed affectionate conduct of his wife, being

widow of Sir N. C., who in fact had been married to one R.,
 * 28 after the decease * of her former husband, and who had deserted her before the date of the will, she at that time representing herself as a single woman, and the widow of Sir N. C., and the testator and others always so regarding her, it was held that she, and her husband in her right, were entitled to the legacy.⁵¹

16. And where the person is sufficiently identified, the legacy will be upheld, notwithstanding some discrepancy between the description and the character of the person intended. Thus, where the testator,⁵² who was domiciled in Jamaica, became, during a temporary residence in Frankfort, engaged and betrothed to a lady; and by a codicil to his will, after mentioning her by name, and alluding to his intended marriage with her, gave £3,000 to *his wife*. During the engagement, and before the marriage, the testator died, and it was held the lady was entitled to the legacy.⁵² It may be proper to state in this connection that bequests to one, by the designation of the wife of the testator, or of some other person, must be confined to the wife, at the date of the will, if the person have one at that time.⁵³

deceived by her, gives her a legacy, as to his chaste wife, evidence of her violation of her marriage vow could be given against that." But, under the circumstances of the present case, the learned judge adds: "I am warranted to make a precedent; and to determine that, whenever a legacy is given to a person under a particular character, which he has falsely assumed, and which alone can be supposed the motive of the bounty, the law will not permit him to avail himself of it, and therefore he cannot demand his legacy." And it was accordingly held, in a recent case, *Wilkinson v. Joughin*, 12 Jur. n. s. 330, that where the testator gave a legacy to one, described as and believed by him to be his wife, the person being herself aware that she had a husband living when she went through the ceremony of marriage with the testator, and during all the intervening period until his death, that the legacy was void. But it was held in the same case that a legacy given by the testator to the daughter of the first legatee, by her husband, and described as his step-daughter, she being innocent of the fraud of her mother, was valid.

⁵¹ *Rishton v. Cobb*, 9 Simons, 615.

⁵² *Schloss v. Stibel*, 6 Simons, 1. *Shadwell*, Vice-Chancellor, said, "The legacy given to the plaintiff is not given on condition of the testator marrying her."

⁵³ *Garratt v. Niblock*, 1 Russ. & My. 629. In this case the testator was a married man, at the date of the will, but his wife subsequently deceased, and he married again, and lived for a time with his second wife, without altering his will. The second wife survived her husband, and claimed the legacy, but the court refused to decree it to her. With all due deference to the general soundness of the rule, as applied to others beside the wife of the testator, we

* 17. But where bequests are made to a class, as the children of a person by name, it will be construed in general, and unless there is something in the case to indicate a different purpose, to include children by different marriages.⁵⁴ In this case the devise

must say, it seems to us, the intention of the testator is too apparent, in such a case, to allow a mere technicality to defeat the fairly expressed purpose of the will. The application of the rule to such a case can be nothing less than a perversion of the principle intended to be preserved; for the language of the will is ambulatory until the death of the testator, and finally comes to be his effective language only at the moment of his decease. How unnatural, then, to confine the terms strictly to the moment of their first use, in the case of the testator's own wife, where it is certain, if he had not supposed the import of the words would be allowed to embrace any person in that relation to him, at the time they became operative, he would have made such addition to his will as was necessary to give them that effect. The construction, therefore, as applied to a case of this character, is the merest refinement, as it seems to us. It is adhering to the letter, and wholly disregarding the sense of the language, where it is so evident the bequest was intended for one described by the relation, and not for a particular person.

In the case of *Bryan's Trust*, 2 Simons, N. S. 103, a similar construction was adopted with much greater propriety, in regard to a bequest to the testatrix's daughters' husbands, whom she had before named in her will by their proper names, and the court held that the words "the husbands of my said daughters" referred exclusively to those persons whom the testatrix had before named as such, and that those persons who had come into the position of husbands of her daughters after the making of the will, by the decease of the husbands then living, could take nothing under that clause in the will. See also *Franks v. Brooker*, 27 Beav. 635.

The early cases wherein it was held that a devise to the wife of A. B., the husband having deceased, and the wife married again before the decease of the testator, will still go to her, although at the time the will takes effect she is the wife of another person not named in the will, seem to rest upon a different principle. It is much the same as if the person had changed his name or residence, after the date of the will, having been described therein by both, or by the addition of some profession, office, or pursuit, either of which might not, at the decease of the testator, form the proper designation of the person intended. It is very obvious any such change of description should not have the effect to defeat the bequest. *Brett v. Rigden*, Plowd. 340, 344 a; s. c. cited in *Woodright v. Wright*, 10 Mod. 370, 371.

By the present English Wills Act the second marriage will revoke the former will. So that no such question could there now arise as to the testator's own wife. But one may still occur as to the wife of another. *Boreham v. Bignall*, 8 Hare, 131. In a late case, *In re Lynes' Trust*, L. R. 8 Eq. 65, the word "wife" as to the son of the testator, "in case she should survive him," was construed any wife who should survive the son.

⁵⁴ *Critchett v. Taynton*, 1 Russ. & My. 541. See also *Barrington v. Tris-*

was to all the children of the testator's daughter not specially provided for, as tenants in common, with a devise over in case they should all die under twenty-one, or marry without consent. The first husband of the daughter was living at the date of the will, and at the decease of the testator, and although it was thus plain the testator had not in contemplation a second marriage of his daughter, yet the gift over being only in case she left no issue, it was held that the children of the second marriage should take equally with those of the first.

18. And a gift to brothers and sisters, or to the children of * 30 * brothers and sisters, includes brothers and sisters of the half blood, as well as those of the full blood.⁵⁵

19. But it seems that the relations by affinity are not to be included under general words, and that clearer forms of language will be required to carry a bequest to that extent than to carry it beyond the strict class defined by the primary import of the words.⁵⁶ But where the bequest is "to my other nephews

tram, 6 Vesey, 345; *Peppin v. Bickford*, 3 Vesey, 570; *Ex parte Ilchester*, 7 Vesey, 348, 366; 2 Jarman, 140. But see *Stavers v. Barnard*, 2 Y. & C. C. C. 539, where a somewhat stricter construction was adopted, based partly upon the special facts of the case.

⁵⁵ *Grieves v. Rawley*, 10 Hare, 63.

⁵⁶ *Hussey v. Berkeley*, 2 Eden, 194; *Smith v. Lidiard*, 3 Kay & J. 252. In this case the testatrix had given legacies to two of the nieces of her late husband, calling them her nieces, and then gave the residue to her respective "nephews and nieces," in equal shares, and it was held only to include the nephews and nieces of the testatrix. The case of *Owen v. Bryant*, 2 DeG., M. & G. 697, was similar, and decided in favor of the relations by affinity. But there the words "said" and "which," referring back to the very persons named, were used, which made the purpose clear of all doubt. In the very recent case of *Grant v. Grant*, 18 W. R. 230, in the English Court of Probate, the testator gave his nephew, Joseph Grant, a legacy, and also made him executor. He had one nephew of that name, but he seldom saw him, and knew but little of him. But there was another Joseph Grant, the nephew of the testator's wife, who lived in the same house with him, and with whom he was on terms of intimacy, and whom he always called his nephew. Lord *Penzance* held the testimony admissible to show the probable intention of the testator. But it seems somewhat questionable how far the decision comes strictly within the general course of decision upon the subject. Unless "nephew" is a term fairly applicable in its primary sense to relations by affinity as well as by consanguinity, there could not be said to have arisen any case for the admission of parol evidence to show intention. And in the

and nieces, on both sides," it was held that the children of the brothers and sisters of the testator's wife must be included. Sir *J. Romilly*, M. R., said he "should otherwise be striking out the words 'on both sides' altogether."⁵⁷

20. The American cases, in the main, profess to follow the principles of the English cases upon the questions involved in the present section, and it will not be useful to refer to them here very much in detail. But some few may profitably be alluded to.

* In *Miles v. Boyden*,⁵⁸ it was held, that a bequest "to the * 31 two oldest children of M.," one of the two oldest at the date of the will having deceased before the testator, might be so construed as to embrace the two oldest at the death of the testator. There had been a codicil to the will, after the decease of one of the two oldest children, but without alluding to this bequest; and the court in deciding the case say, "It is the opinion of the court that the testator intended to designate the two children of — by age, and not by name." In other words, the court held that the bequest was to the particular relation, and not to any particular persons. The case of *Lady Lincoln v. Pelham*⁵⁹ seems to be somewhat of the same character, where Lord Chancellor *Eldon* argues the point quite at length, to show that where persons are described by particular relations, either to the testator or to others, it is not to be construed as a circumlocution to identify individuals, which would be an unnatural course, but it is rather to be treated, as the words naturally import, as a bequest to those persons who sustain the particular relation to the person named, and that these words, thus creating a bequest to persons standing in a specified relation to another, are to be treated, like other portions of the will, as ambulatory, until the death of the testator, and as finally limiting the bequest to those persons who shall sustain that particular relation at the decease of the testator, when the words, strictly

view in which the case seemed to be put by the court, unless the term "nephew" may fairly be regarded as equivocal in its primary and natural sense, so that it could be said to be reasonably doubtful whether it embraced both classes of nephews, there was no occasion to show the position of the testator with reference to these two nephews, in order to aid the construction. It seems more a case of latent ambiguity, than that of a term of doubtful import or application. But the decision certainly commends itself to our sense of justice and to reason and good sense. See vol. 1, p. 581, pl. 5, n. (b).

⁵⁷ *Frogley v. Phillips*, 6 Jur. N. S. 641.

⁵⁸ 3 Pick. 213.

⁵⁹ 10 Vesey, 166, 172.

speaking, first become operative. This, we must confess, seems to us the more just and natural construction, but may not, probably, find the same support from the decided cases as that which regards the words descriptive of the relation, as intended to identify particular individuals. We know of no good reason why words descriptive of a relation may not be referred to the time when the bequest takes effect, as we have seen is the general rule in regard to the construction of the language of wills,⁶⁰ and especially terms descriptive of classes of persons.⁶¹

21. It has been held in Pennsylvania,⁶² that a bequest, to be divided equally among the testator's heirs named in his will, shall be taken as referring only to such as are technically heirs

de jure, and will not include all who share in the estate
* 32 * under the will. So, a residuary bequest by the testatrix,

"to all my nephews and nieces," will not embrace those of her husband.⁶³ And the word "children" must have its strict and ordinary construction, unless the context, with reference to extraneous facts, shows that it is used in a more extended sense.⁶⁴

22. Where a gift over is made to depend upon the pre-decease of another, the fact that such decease occurs in the life of the testator will not defeat the gift over; but where that is to a class, those born into the class before the death of the testator will participate in the bequest, although born after the contingency upon which the gift over was to take effect.⁶⁵

⁶⁰ Ante, vol. 1, § 30, pp. 378-388. See also ante, n. 53.

⁶¹ Ante, pl. 2.

⁶² Porter's Appeal, 45 Penn. St. 201.

⁶³ Green's Appeal, 42 Penn. St. 25. The word "heirs" is often used to designate children. *Ellis v. Essex and Merrimack Bridge*, 2 Pick. 243; *Bowers v. Porter*, 4 Pick. 198; *Haley v. Boston*, 108 Mass. 576; *Kiah v. Grenier*, 56 N. Y. 220. The terms "all the children of" may, by reference to other portions of the will, be restricted to certain persons before named. *Lorillard v. Coster*, 5 Paige, 172. A bequest to the testator's heirs, the only persons bearing that relation at the date of the will, and also at the death of the testator, being the children of his deceased brothers and sisters and the representatives of such children, was held to pass per stirpes and not per capita in Connecticut, by reason of the rule established in that state at an early day, contrary to the general rule under the English and similar statutes, not allowing representation beyond the degree of brothers' and sisters' children. *Cook v. Catlin*, 25 Conn. 387.

⁶⁴ Bedford's Appeal, 40 Penn. St. 18.

⁶⁵ *Carver v. Oakley*, 4 Jones, Eq. 85. A general bequest to children will include only those born or in being at the death of the testator. *Smith v.*

23. In a late case⁶⁶ in Kentucky, it was decided that the term "children" could only be construed to embrace other descendants, when that became indispensable in order to give any operation to the will, or else when it was made apparent from other portions of the will that the testator intended to use it in that sense. And this seems to be the general doctrine of the American courts,⁶⁷ and equally, as we have before shown, of the English courts.

Ashurst, 34 Ala. 208. And the same rule applies where the period of distribution is deferred. *Beasley v. Jenkins*, 2 Head, 191.

⁶⁶ *Churchill v. Churchill*, 2 Met. (Ky.) 466.

⁶⁷ *Walworth*, Chancellor, in *Collins v. Hoxie*, 9 Paige, 81, 88; *Cromer v. Pinckney*, 3 Barb. Ch. 466; *Gardner v. Heyer*, 2 Paige, 11; *Mowatt v. Carow*, 7 Paige, 328; *Hone v. Van Schaick*, 3 Barb. Ch. 488; s. c. 3 N. Y. 538; *Appeal of Gable's Ex'rs*, 40 Penn. St. 231; *Ward v. Sutton*, 5 Ired. Eq. 421. The word "children," in a bequest, will not be taken to include grandchildren, unless such intention is made very obvious from other portions of the will, &c. *Hallowell v. Phipps*, 2 Whart. 376; *Dickinson v. Lee*, 4 Watts, 82. But in a bequest to "the children and legal heirs of my brother A.," a grandchild of A., whose parents died before the testator, was held entitled to share with the children living at the testator's death. *Sorvor v. Berndt*, 10 Penn. St. 213. By clear intendment children may embrace grandchildren. *Osgood v. Lovering*, 33 Me. 464. Grandnephew not included under term "nephew," even when parents have deceased. *Van Gieson v. Howard*, 3 Halst. Ch. 462.

There are some cases in the English books where the description of the legatee has been construed with great strictness, and bequests thereby often defeated upon grounds of the literal application of the use of terms in the will; as where the children of such as *shall* have departed this life was held not to include the child of one of the class deceased before the making of the will. *Waugh v. Waugh*, 2 My. & K. 41. This strictness is too common. In a recent English case, a bequest of an aliquot proportion of the testator's estate to "the heirs and assigns of my late sister D., now deceased," was held to be a bequest to the statutory next of kin of D. at her decease. *Newton's Trusts*, Law Rep. 4 Eq. 171. But where the testator gave £1,000 in trust for A. for life, remainder to her children, and if she died without children, then "to the next personal representatives of A.," it was held that this did not import "her executor or administrator" nor her next of kin according to the statute, but "her nearest of kin;" and A. having deceased, leaving no children, but a husband, brother, and sister, and the child of a deceased sister. It was therefore held the brother and sister were entitled to hold as joint tenants. *Stockdale v. Nicholson*, Law Rep. 4 Eq. 359; s. c. 15 W. R. 986. A more natural construction, and one more likely to meet the desire of the testator, would have been to allow the representative of the deceased sister to take concurrently with the surviving brother and sister, as tenants in common, and quite as consistent with the terms of the bequest. And such is the view

* 33 * 24. In a recent case⁶⁸ in Connecticut, it was held that a bequest to the testator's children and their heirs respectively should be so construed as to embrace all the testator's children living at the time of his decease, and the representatives of
 * 34 such as had * deceased, leaving children. In this case, the testator, at the time of his decease, had four children living, and four others had deceased, leaving children.

25. Bequest to classes gives the individuals embraced therein an equal share per capita. But where there are not words indicating a purpose to have the bequest go in shares, it will be so construed, and the several classes take per stirpes.⁶⁹

26. In North Carolina legacies to a class vest, upon the death of the testator, in all of the class then in existence, but where there is an intervening life-estate, all born into the class during the life-estate must be let in ; but those who die during the same period are not divested of their interest.⁷⁰

taken in regard to the nature of the tenancy, where the children of a deceased member of a generation take, by representation, in common with survivors of the generation. *Hodges v. Grant*, Law Rep. 4 Eq. 140; s. c. 15 W. R. 607. Where the testator gave a fund in trust to pay the income to A. during life, and, on the death of A., leaving issue, both principal and interest to go to them in equal shares, to be paid, if sons, at twenty-one; if daughters, at twenty-one or marriage, with benefit of survivorship; of the five children of A. who survived the testator and attained twenty-one, two, B. and C., died in A.'s lifetime, and three survived him: it was held that B. and C. took vested interests, and their personal representatives were entitled to share with the surviving children. *Corneck v. Wadman*, Law Rep. 7 Eq. 80. The general proposition that natural children will take under the will, if they answer the description, and no others do, is maintained in *Martin v. Holgate*, Law Rep. 1 H. L. 175; s. c. 15 W. R. 135; *Lepine v. Bean*, L. R. 10 Eq. 160. See also *Scott v. Harwood*, 5 Madd. 332; *Price v. Lockley*, 6 Beav. 180; *Hall v. Hewer*, Ambler, 203.

⁶⁸ *Bond's Appeal*, 31 Conn. 183.

⁶⁹ As where individuals of one generation are enumerated, and the heirs of a deceased one of the same generation. *Balcom v. Haynes*, 14 Allen, 204. Or where a fund is directed to be distributed to the heirs or next of kin of a class of persons named. *Grandy v. Sawyer*, 1 Phillips, Eq. N. C. 8; *Cooper v. Cannon*, id. 83. See also *Fisher v. Skillman*, 3 E. C. Green, 229; *Hoxton v. Griffith*, 18 Gratt. 574. Or, upon a bequest to the heirs of my late husband and my heirs equally, the legatees take in moieties per stirpes. *Bassett v. Granger*, 100 Mass. 348. So where the testator gives to his next of kin by classes, leaving the proportions doubtful, the classes will take per stirpes. *Harris's Estate*, 74 Penn. St. 452.

⁷⁰ *Mason v. White*, 8 Jones, Law, 421; *Wilder v. Ireland*, id. 85; *Sims v. Smith*, 6 Jones, Eq. 347.

SECTION III.

THE CONSTRUCTION OF THE WORD "ISSUE."

1. The word "issue," in its natural import, includes all the descendants of every generation.
2. Under a bequest to issue, all the descendants take per capita and as joint tenants.
3. This is the settled English construction of the word, where there is nothing in the will to restrain its operation.
- u. 3. Definition of the distinction between words of limitation and words of purchase.
4. Abstract of some of the early cases.
- n. 5. The American writers seem to regard the primary import of "issue" as children.
5. The more recent cases in England favor the same view.
6. An abstract of several cases where this is shown.
7. We should profit by the experience of the English courts, and adopt the natural import of the word.
8. Vindication of the American view of the import of "issue."
9. Justice requires us to restore the word to its natural import.
10. The English statute giving bequests to issue to save a lapse.
- * 11. The effect of the statute is to enable the issue to take as heirs or next of kin. * 35
12. The word "issue" is thus made one of limitation, and not of purchase.
13. The statute of Massachusetts upon the same subject.
14. The construction of that statute not fixed by their courts.
15. The only case which has occurred is, in substance, the same as the English cases.
- 16, and n. 34. Case of reference under Massachusetts statute stated.
17. The only question whether issue could be synonymous with descending heirs.
18. The latest English case comes precisely to this point.
19. In Pennsylvania, bequest to the issue of A., B., and C. construed distributively.
- 20, and n. 42. A bequest of personalty to one by name for life, and to the issue of such person, creates an estate for life in the first donee, and the issue take the remainder as purchasers.
21. The English courts adopt this construction. Review of the cases.
22. The supreme court of Pennsylvania adopt the same view.
- 23-25. Brief reference to American cases upon the subject.
26. The word "issue" construed as one of purchase upon the intent of the instrument.

§ 3. 1. THE term "issue" illustrates, in a striking manner, the different senses in which the same word or expression may be construed, according to the context, the attending circumstances, or the purpose for which it is used. The more common import

attached to the word "issue," in English equity law, is that of offspring or descendants. And in this sense it includes all the descendants in being at the time the term becomes operative.¹

¹ *Haydon v. Wilshere*, 3 T. R. 372. This is the case of a bond conditioned to be paid, if any of the issue of a marriage be alive at a certain time. The children had all died, but grandchildren were still living, and they were held "issue," within the meaning of the condition. Lord *Thurlow*, in *Hockley v. Mawbey*, 1 Ves. jr. 143, 150, says the "word 'issue' would extend to grandchildren, or any other degree of kindred, however remote." The cases are very numerous to this point, and we are not aware of any conflict in regard to it being allowable to give it that construction. *Wyth v. Blackman*, 1 Vesey, sen. 196. But the addition of the words "child or children" after the word "issue" will restrict its import to that of children. *Horsepool v. Watson*, 3 Vesey, 383; *Burleson v. Bowman*, 1 Rich. Ch. 111. "Male issue" construed to import sons. *Murray v. Addenbrook*, 4 Russ. 407. "Dying without issue" construed, without issue living. *Target v. Gaunt*, 1 P. Wms. 432; *Keily v. Fowler*, 3 Br. Parl. Cas. 299. The word "issue" may be limited to children in one clause of a will, and embrace all the descendants as used in another portion of the same instrument. *Head v. Randall*, 2 Younge & Coll. C. C. 231; *Dalzell v. Welch*, 2 Sim. 319. But where the testator defines the import of the word "issue" in one portion of his will, it must receive the same construction in other portions of the same instrument, unless it appears very clearly that such was not the testator's intent. *Ridgeway v. Munkittrick*, 1 Dru. & War. 84. The term "issue" held to embrace all the descendants born before the time of distribution. *Clay v. Pennington*, 7 Sim. 370. But in regard to estates tail, and in many other cases, the word "issue" is construed as equivalent to children, and as being a word of purchase. *Cursham v. Newland*, 2 Bing. N. C. 58; s. c. 4 M. & W. 101; *Swift v. Swift*, 8 Sim. 168; *Goldie v. Greaves*, 14 Sim. 348. The period of survivorship fixed with reference to the death of the person last entitled, and not of the testator, so as to admit issue born after the death of the testator. *Buckle v. Fawcett*, 4 Hare, 536; *Drayton v. Drayton*, 1 Desaus. 324. Death of issue construed issue which might take. *Malcolm v. Taylor*, 2 Russ. & My. 416, 428. "Issue" construed *issue living* at the decease of the parent. *Leeming v. Sherratt*, 2 Hare, 14. "Issue" construed *children*. *Walker v. Petchell*, 1 C. B. 652. "Issue male and female" construed *sons and daughters*. *Crozier v. Crozier*, 3 Dru. & War. 373; s. p. *Farrant v. Nichols*, 9 Beav. 327. It has been held the word "issue" is not to be regarded as technically a word of limitation, and its force will be governed by the intent of the testator gathered from the scope of the will. *Bryan v. Mansion*, 5 DeG. & S. 737; *Re Wynch's Trusts*, 23 L. J. (N. S.) Pt. I. 930; s. c. 18 Jur. 659; DeG. M. & G. 188. It was held too that where the issue take in connection with those of the generation of the ancestor, they will take per stirpes. *Minchell v. Lee*, 17 Jur. 727. But such issue may be regarded as taking under the will a substantive gift, and not by way of substitution. *Attwood v. Alford*, Law Rep. 2 Eq. 479; s. c. 14 W. R.

* 2. Under a bequest of personalty to issue, all the descendants, including children and grandchildren, to the remotest descendants, will take per capita and not per stirpes,² and as joint tenants.² In this case the bequest was to one, or her issue. That person died in the life of the testator, leaving one son and two children of a deceased daughter, and the three were held entitled per capita. In this sense it is used as a word of purchase, and not by way of limitation.³

* 3. The word "issue," according to the English construction, where nothing appears to qualify its import, is to be regarded as a word of purchase, and to include all the descendants. In the language of the court in *Leigh v. Norbury*,⁴ "It is clearly settled that the word 'issue,' unconfined by any indication of intention, includes all descendants. . . . Intention is required for the purpose of limiting the sense of that word, restraining it to children." The difficulty seems to be in determining what shall be a sufficient indication of intention to use the term "issue" in a

956. And a provision in the will for the testator's children, to take effect after the decease of his wife, with provision that if any of his children should die before his wife leaving issue, such issue should take the share of the parent, was held to embrace the issue of a child deceased before the date of the will. *Giles v. Giles*, 8 Sim. 360. But see *Waugh v. Waugh*, 2 My. & K. 41; *Tier v. Pennell*, 1 Edw. Ch. 354; *Ruff v. Rutherford*, 1 Bailey, Ch. 7. Bequest to be divided equally among all the testator's children at the death of his wife, where one child living at the date of the will died during testator's life, leaving issue, such issue were held entitled. *Deveaux v. Barnwell*, 1 Desaus. 497; 1 Jarman, 89; 2 Wms. Ex'rs, 999.

² *Davenport v. Hanbury*, 3 Vesey, 257. A devise to "issue" will, of course, not take effect where the parent of such issue survives the testator, although not surviving the period of distribution, the bequest having already vested in the parent. *Heasman v. Pearse*, L. R. 7 Ch. App. 660. See also *Mitchison v. Buckton*, 23 W. R. 480.

³ This distinction, although familiar to the profession, is one whose application is not always kept sufficiently in mind. It is based upon the point, whether the persons designated take by force of the instrument, and because they are named in it, or because of their relation to some other person, who acquired such an estate under the instrument; as if by operation of law it descended to them on account of the relation, and not on account of their being named in the instrument. Thus the word "issue" may be used to define the estate given, and to distinguish it from a life-estate, or it may be used because the donor had the particular persons included under the term "issue" in his mind, and desired to benefit them. In the latter sense it is a word of purchase, and in the former one of limitation merely.

⁴ 13 Vesey, 340.

restricted sense.⁵ The cases where issue has been construed to be a word of purchase, and as such to include all the descendants, are very numerous, and have been either decided or recognized by all the more eminent English equity judges. Thus, in *Bernard v. Mountague*,⁶ Sir *William Grant*, a great authority in equity law, said: "There is nothing in the clause directing the portion to go over, . . . that should confine its operation; but that the grandchildren will be entitled, as well as the children, under the general description of 'issue.'"

4. The early cases favored this construction of the word "issue" much more than the later ones. In *Cook v. Cook*,⁷ there is a good deal of discussion in regard to the meaning of the term "issue" and other analogous terms. It is here held, that in a devise to the issue of J. S., who had a daughter living, and afterwards a son * 38 * born, all the children shall take,—and even grandchildren, if there were any. And also, that in a devise to J. S. and his children, the children take with the father, if he have any then living, but if not, it creates an estate tail. And that in a devise to a man and his children, a child born after the death of the testator shall not take. And in *Wythe v. Thurlston*,⁸ Lord *Hardwicke* said: "The word 'issue' will carry it to all descendants; and in the present case the word 'children,' which may admit of a more restrained signification, shall¹ be extended so as to enable all the children, grandchildren, and great-grandchildren, to take, and they take per stirpes, and not per capita."

5. But the courts have certainly ingrafted a very great number of exceptions upon the rule, and the later English decisions seem to manifest a disposition in the courts, as far as possible, to get

⁵ It seems to us that the term "issue," in its primary signification, imports children, and that it is a secondary meaning by which it has been held to include the issue of issue in an indefinite descending line. It is susceptible, more naturally than "children," of including all descendants; but the primary sense certainly is that of *direct* issue; and it is only in a secondary sense that it also includes remoter descendants, as the issue of issue. The greatest authority in American law, Chancellor *Kent* (4 Comm. 278), in note, says: "The term 'issue' may be used either as a word of purchase or limitation, but it is generally used by the testator as synonymous with child or children;" and we must confess the opinion of the learned commentator seems to us to be founded in truth, and that it will be found to be borne out by experience.

⁶ 1 Mer. 422, 434.

⁷ 2 Vernon, 545.

⁸ Ambler, 555.

rid of the former refinements upon the subject, and from having regarded it as mainly a word of purchase, and intended to embrace a certain number of individuals, supposed to be in the mind of the testator, and to have been the special objects of his bounty, it is, if we judge correctly, fast becoming a word of limitation merely, and, as such, used mainly to define the extent of interest intended to be conveyed to the first donee.⁹

* 6. It was held, in the case of *Sibley v. Perry*,¹⁰ by Lord * 39 *Eldon*, that where the word "issue" was used in connection with that of parents, and to take the share primarily intended for the parents, it must be construed as meaning children. And in this case, in conformity with the general rule, that the same word shall receive the same construction throughout the will, he gave that import to the word "issue" in other portions of the will. But in *Carter v. Bentall*¹¹ the word "issue" received different constructions in different portions of the same will. And where the testator in the will speaks of the issue of the former mentioned

⁹ *Freeman v. Parsley*, 3 Vesey, 421. It was held here, in deference to the early cases, that the word "issue" will include grandchildren as well as children. But Lord *Loughborough*, in giving judgment, said: "In the common use of language, as well as the application of the word 'issue' to wills and settlements, it means all indefinitely. I very strongly suspect that in applying that to this will I am not acting according to the intention. But I do not know what enables me to control it. If a medium could be found between a total exclusion of the grandchildren and the admission of them to share with the parents, the nearest objects of the testator, that would be nearer the intention, as by letting in those whose parents were deceased, to take the share the parents, if living, would have taken." This admission of so experienced an equity judge goes far to convict the English rule of having perverted the intention of testators, in the majority of instances. There can be no question that in the great majority of cases, say ninety-nine in a hundred, where testators have given estates to children, or to them and their issue, they do have in mind the precise distinctions averted to above, and intend the issue to take only by way of substitution of, and not in competition with, the ancestor. It might therefore seem more just, and surely more frank, in the courts, to change the rule of construction by a sweeping overruling of the former cases, than to attempt to reach the same practical result by a multiplicity of exceptions, every one of which demonstrates the fallacy of the rule. In saying this, we only intend that if the courts could restore the term "issue" to its primary sense, of children, and treat its extension so as to include all descendants as a secondary signification, it might enable them to escape some of the refinements into which they are driven, at present, in consequence of the early English cases having established the opposite construction. Post, n. 42.

¹⁰ 7 Vesey, 522.

¹¹ 2 Beav. 551.

issue, it is thus made apparent that he intended to use the term "issue" to designate children.¹² And in *Doe d. Cannon v. Rucastle*,¹³ *Maule, J.*, said: "Issue has two senses, one comprehending all descendants; and if there be any thing which shows it does not mean that, then it means immediate issue,—children." And in *Slater v. Dangerfield*¹⁴ it was held that issue was to be construed children. *Parke, B.*, said: "The word 'issue' in a will *prima facie* means the same thing as heirs of the body, and is to be construed as a word of limitation; but the *prima facie* construction will give way, if there is any thing on the face of the will sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class, or at a particular time. . . . The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense?" Where the issue of a daughter was to take her share, it was held limited to children.¹⁵ Lord *Langdale* here says: "The * 40 word 'issue' may, and often does, * mean children." And in holding that in another portion of the will the testator used the word "issue" in a different sense, he adds: "It is certainly difficult to suppose that the testator can have really meant that which appears to be the legal import and effect of the words of his will, or that he can have intended to use the word 'issue' in different senses in the two clauses." And in *Peel v. Catlow*,¹⁶ where a bequest is made to the children of A. B., to be paid to them at twenty-one, and, in case any of them should die under that age leaving issue, their share should be paid to such issue, it was said that the word "issue" must be held to mean children, and as the same word in other portions of the will was used with reference to this clause, it must be held to have the same import. The learned judge, Sir *Lancelot Shadwell, V. C.*, in another case reported in a

¹² *Pope v. Pope*, 14 Beav. 591; *Williams v. Teale*, 6 Hare, 239.

¹³ 8 C. B. 876, 880; *Miller's Appeal*, 52 Penn. St. 113.

¹⁴ 15 M. & W. 263. In *Humfrey v. Humfrey*, 8 Jur. n. s. 500, s. c. 2 Drew. & Sm. 49, 18 W. R. 286, it was held that issue which pre-deceases the father can take nothing as such. Post, n. 42.

¹⁵ *Carter v. Bentall*, 2 Beav. 551. This case shows with what pertinacity the English courts adhere to the fixed legal import of terms, even when they occur in wills, where more latitude of construction is allowed than in most other instruments; s. c. 4 Jur. 691.

¹⁶ Am. ed. 9 Simons, 372, 376, 377.

note to this case,¹⁶ said: "I am of opinion, that if there be nothing more in a will or other written instrument whereby to construe the term 'issue' than a direction that the issue are to take the shares of their parents, that is enough to confine the general meaning of the word 'issue' to the particular meaning of 'children' of that parent." And the same construction was adopted in another case which came before Sir *William Grant*, at the Rolls, in March, 1814, *Harrington v. Lawrence*,¹⁶ not reported. We shall have occasion to recur to this subject again, with reference to real estate. We will here state the substance of some of the later English cases. In *Pruen v. Osborne*,¹⁷ the Vice-Chancellor, *Shadwell*, held, that a direction that the issue shall take only the shares of their parents, which they would have taken if living, must be taken to show that the word "issue" is used in the restricted sense of children. And in *Hedges v. Harpur*,¹⁸ "issue" is held synonymous with children, and to be a word of limitation, and not of purchase. In *Edwards v. Edwards*,¹⁹ Sir *John Romilly*, M. R., said: "The expression 'issue' may either mean all the descendants in every degree, or it may be used in a more limited sense. The word admits of different meanings, and when used in an ambiguous or equivocal sense its meaning must either be collected from the immediate context, or by reference to the mode in which it is used elsewhere in the same will." In *Bradshaw v. Melling*,²⁰ the word "issue" was construed to mean children, being used with reference to the share * of the parents; and grandchildren were not admitted to an * 41 equal participation with the children, during the life of the parent. And at the final distribution of the estate the children then living took the whole estate, to the exclusion of the grandchildren representing a deceased child. But the last point was held to be controlled, to some extent, by the phraseology of the will. And so also in *Smith v. Horsfall*,²¹ the grandchildren of a deceased child were excluded from taking the share of the parent. But in *Maynard v. Wright*²² it was held that "issue" was to be

¹⁷ 11 Simons, 132.

¹⁸ 9 Beav. 479.

²⁰ 19 Beav. 417.

¹⁹ 12 Beav. 97.

²¹ 25 Beav. 628.

²² 26 Beav. 285. Sir *John Romilly*, M. R., said: "It is, therefore, just as if he (the testator) had said, that if any one of my sons and daughters shall have died, the issue of such deceased son or daughter shall take his or her father's or mother's share."

read children, being a correlative to parent, as there used. And in *Ross v. Ross*²³ it was held that the word "issue," with reference to a "parent," creates a substantial gift, and from the context in the will it was held not limited to "children," and a grandchild was allowed to take the share of the parent, who was of the same generation with the class who took the burden of the bequest.

7. We might continue this analysis of cases much further. But we think enough has been shown to convince the profession in America, that the English courts have long regretted the unfortunate bias which has been there given in regard to the proper import of the word "issue," at an early day, when it was more the practice, than in modern times, to attempt to decide causes according to the specific justice of the particular case, rather than upon

any general rule, or principle. This is all very well, and not
 * 42 * calculated to prejudice other causes; unless, or until, the courts (from the multiplicity of causes, or the natural infirmity of human judgment, whereby it seeks to lean for support upon the opinion of others, by which precedents become of so much weight) are thereby induced to generalize those special cases which have been decided upon their peculiar circumstances. The result then is, sometimes, that the entire class of cases comes to be controlled by the accidental direction which some few of the earlier ones happened to take, from their own peculiar features, and the rule thus educed—and which is of so much more consequence than all the cases upon which it is founded, since it is liable to

²³ 20 Beav. 645. In *Robinson v. Sykes*, 23 Beav. 40, a bequest, limited to the issue of children, was held to pass per stirpes, and not per capita. Sir *John Romilly*, M. R., said: "I am of opinion that though the word 'issue' is nomen generalissimum, and includes all the remotest descendants, nevertheless, held that where issue are pointed out as persons to take with reference to the share of the parent, a gift which, so far as regards the parent, fails, they take on the principle which may be called a quasi representative principle; that is, that the children of *each parent whose share fails* take that parent's share, but not admitting the grandchildren to take in *competition* with the children to participate in the share of that deceased parent." The bequest is divided "amongst a class in the same generation, and that each share of a parent which fails is divisible amongst his children, if he has any, or if not, amongst his grandchildren, excluding in the former case the grandchildren, if there should be any, and in the latter case great-grandchildren." See also *Amson v. Harris*, 19 Beav. 210; *Pope v. Pope*, 14 Beav. 591, 594; *Rhodes v. Rhodes*, 27 Beav. 413.

control an indefinite number of other cases coming after — is really founded upon the mere accident of the priority of a few special cases, depending upon peculiar circumstances; and often upon peculiar phraseology. That this has been the fact in regard to the present subject, there can be little doubt, when we reflect how repeatedly the English judges have expressed the opinion, that giving the word "issue" the import of descendants, tends manifestly to the defeating of the intent of testators, in the majority of instances; and especially when we consider further, that in all the recent decisions of the English courts upon the subject, which are very numerous, there is apparent a disposition and an effort to escape from the trammels of the former decisions, by ingrafting a multiplicity of exceptions, upon the slightest possible distinctions. The same view will be further confirmed by reflecting how very few of the profession even are familiar with the nicety of the distinctions growing out of the decisions of the courts upon this point; and how unreasonable it would therefore be to suppose, that the testators, in the majority of cases, could have been conversant with any such refinements. From all which it becomes sufficiently obvious, that the term "issue," so far as personalty is concerned, should receive the construction of heirs, and be treated as a word of limitation and not of purchase, unless there is something to show it was intended to be used otherwise.

8. The American courts by adopting such a construction, and following the lead of their greatest law writer, the late Chancellor *Kent*, will do the law an important service, in redeeming it from a perversion under which it has long labored, and which has already produced infinite injustice, and unless abandoned will be liable to produce an incalculable amount in the future. And we venture the conjecture, that by restoring this perverted construction of the * word "issue" to its original simple * 43 significance, there will not occur a single instance in which injustice shall be done in consequence of the restoration. In inquiring how most testators come at the import of such a term as "issue," or "offspring," when introduced into the last testamentary disposition of their estates, we can be at no loss to perceive that it must be in the sense of *descending heirs*. It would not occur to one testator in a thousand, that by such a provision in his will, the estate could be divided among all the descendants living at the time of the distribution, thus admitting two or three genera-

tions, parents and children, to participate concurrently, and per capita. And it is probably safe to affirm, that a very large proportion of the profession, and even those of them most occupied in the business of preparing wills, would not expect any such result, unless after special examination of the books.

9. We have thus given expression to our clear convictions upon this question, not from any desire to become an innovator, or to unsettle foundations, but because we deem it an act of simple justice to the very large class of persons interested in testamentary dispositions of property; and especially because, at the present time, there have been very few decisions in this country bearing upon the question, and more especially, because such a course as we urge, in the American courts, could do no harm, and cannot fail to do much good in more ways, and to a greater extent, than we can now fully comprehend. In writing a treatise upon so important a subject as the law of the settlement of estates, which affects men's pecuniary interests more, by far, than any other, more, perhaps, than all others, we could not justify it to our sense of duty, not to enter some slight remonstrance against blindly following an arbitrary rule of the English courts, which they have long painfully regretted, and which they have now, practically, ceased to follow. For notwithstanding the formal adherence, in the English courts, to what they call the primary import of the word "issue," as including all the descendants, it will be apparent to any one, turning to the recent volumes of the English equity reports, that the cases where "issue" is construed as synonymous with "children," or with "heirs," are, by far, more numerous than all the other cases where the word is held to include all the descendants, thus making the exceptions more numerous than all the cases included under the general rule, which can only be explained

* 44 upon * the ground that the rule should have been made to include what are now the exceptions. All we would now advise is that we adopt Chancellor *Kent's* definition, as the rule, instead of the early English cases, thereby necessitating the consequence already existing there, of making the rule to embrace practically only the exceptions, and vice versa. It will appear hereafter, in the course of this section, that there is a considerable weight of authority, both English and American, in favor of the construction of the word "issue" for which we contend.

10. There is another subject, where the construction of the word

"issue" becomes important, that may properly be here considered. The present English statute of wills²⁴ provides, "that where any person, being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed, for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator, leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will." This matter has already been very considerably discussed in the English courts. It was decided²⁵ that the statute did not substitute the issue of the donee in the place of such donee, but prevented the lapse by vesting an estate in the donee under the will, during the life of the testator, the same precisely as if he had survived the testator. This is thus defined in the last English edition of Jarman: ²⁶ "The thirty-third section does not substitute the surviving issue for the original devisee or legatee, but makes the gift to the latter take effect, notwithstanding his death in the testator's lifetime, in the same manner as if his death had happened immediately after that of the testator." And even where the death of the donee happened before the date of the will, the surviving issue take, as heirs or distributees, notwithstanding the language of the act is, "shall die,"²⁷ which has been construed to mean "shall die" after the passage of the act. The learned author thus concludes: ²⁸

* "The subject of gift, therefore, will, to all intents and pur- * 45
poses, constitute the disposable property of the deceased
donee, and, as such, will either devolve on his representative,²⁹ or
follow the disposition of his will."³⁰

²⁴ 1 Vic. c. 26, § 33.

²⁵ *Johnson v. Johnson*, 3 Hare, 157.

²⁶ 1 Jarman (1861), 328.

²⁷ *Mower v. Orr*, 7 Hare, 473; *Wisden v. Wisden*, 2 Sm. & Gif. 396; *Barkworth v. Young*, 4 Drew. 1.

²⁸ 1 Jarman, 329.

²⁹ *Winter v. Winter*, 5 Hare, 306. And is liable for the debts of the first donee. *Johnson v. Johnson*, 3 Hare, 157. But this statute will not apply to save a lapse in a legacy by testamentary appointment. *Griffiths v. Gale*, 12 Sim. 327, 354. But the statute will be made to apply to a will, executed before the statute came into operation, by force of a codicil made after the date of the statute. *Winter v. Winter*, supra. The widow of the devisee will be entitled to dower in the estate. *Jones v. Jones*, 37 Ala. 646.

³⁰ *Mower v. Orr*, 7 Hare, 473; *Johnson v. Johnson*, 3 Hare, 157. In *Win-*

11. The effect of this statute was therefore to enable the issue to take, in any legal mode, whether by descent or distribution, or bequest, the portion intended for the ancestor of such issue. And the English courts have given such construction of the word "issue," in this relation, as to make it equivalent to heirs, or next of kin, in the descending line. And it has been recently decided, that it will make no difference that the issue of the donee in existence at the decease of the devisee or legatee, and which prevented the lapse, in the first instance, are not the same issue in being at the time the bequest takes effect, and who must consequently receive the ultimate benefit under it.³¹

* 46 * 12. By the English statute, therefore, the word "issue" is to be construed only as a word of limitation, and as equivalent to the word "heirs," in all respects. There can be no question

ter v. Winter, 5 Hare, 306, Sir James Wigram, V. C., a most reliable authority, said: "In the absence of any thing upon the face of the act to fix the meaning of the words, I am bound, as well as I can, to fix that meaning, by considering the policy of the act, and the objects it was intended to accomplish. Now the policy of the act, and the objects it was intended to accomplish, are, for the present purpose, sufficiently manifest. It was intended to prevent a portion given by a testator to a child going from the estate of such child, and his family from being left portionless, by reason only of the death of the child under certain circumstances, — a consequence of law which the common feelings of mankind declared to be a disappointment of the intention of the father." "The cases in which this event most commonly happened, and against which the act was intended to provide, were cases in which the child died in the testator's lifetime, after the bequest was made, — and cases in which the testator, in providing for an absent child, was ignorant of the fact that such absent child was dead. In both cases the family of the child dying after, or dead at the time of the bequest, was left unprovided for;" and it was to remedy these evils that the act was intended. S. P. Wood v. Sampson, 25 Gratt. 845.

³¹ Re Parker, 6 Jur. N. S. 354. In this case it was held that the word "issue," in its primary sense, included only children. But if there were no children living, then grandchildren came within the meaning of the term. And by parity of reason, if grandchildren are excluded, while their parents are living, and admitted after their decease, the same as in intestate estates, by way of inheritance or distribution, it must follow that where some of the children of the donee have deceased leaving issue, these must take the share of such deceased child, and thus all the issue who take must come in by way of substitution or representation, per stirpes, and not per capita, so as effectually to carry out the purpose of the statute of securing the provision for the donee to his family, in precisely the same manner as if it had come to him; in the language of the act, as if the death of the donee had happened immediately after the death of the testator.

that this construction, adopted by the English courts, was the only one which could have effected the probable intention of the statute. And it seems to us that it is equally apparent such is the common understanding of the word "issue," and that it should be so rendered, unless there is something to indicate a different purpose.

13. We apprehend that this precise question has not as yet come much before the courts in this country. The State of Massachusetts has a statute upon the same subject, which has been in operation, in different forms, from an early period, long before the date of the English statute. But it is drawn up very loosely, and with an obvious disregard of the detail of the essential requisites toward the accomplishment of the general design of the act. It is thus expressed: "When a devise of real or personal estate is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner the deceased would have done if he had survived the testator."³²

* 14. This statute has not come under the consideration * 47 of the courts except in one case,³³ where it was held that a

³² General Stat. ch. 92, § 28. The courts in Massachusetts held early that such a devise must lapse, notwithstanding the statute, where the devisee deceases in the lifetime of the testator, leaving no lineal descendants. *Fisher v Hill*, 7 Mass. 86. By the statute of Pennsylvania, March 19, 1810, *Purd. Dig.* 566, ed. 1831, it is provided that no devise or legacy in favor of a child, or other lineal descendant, shall be deemed to lapse by his or her death in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator, unless the will express a clear intent to exclude such surviving issue. See *Newbold v. Prichett*, 2 Whart. 46. And by the Pennsylvania statute of 1844, *Purd. Dig.* 9 ed. 1017, § 15, this provision is extended to brothers and sisters of the testator, and to their children. But a bequest to one and her heirs was held not to come within the statute, the legatee being a niece of the testator. *Dickinson v. Purvis*, 8 Serg. & R. 71; 2 Wms. Ex'rs (Am. ed.), 998, 1036. But the Pennsylvania courts have not allowed the legatee or devisee, who dies before the testator, to dispose of the estate thus given to him in the same manner as if he had a vested interest in it, as is done under the English statute. Hence where A. made her will, by which she devised certain real estate to her son B., who subsequently made his will, and devised all his estate among his children, and then predeceased his father, leaving several children, it was held that the children of B. took under the will of A., and not under that of B. *Newbold v. Prichett*, 2 Whart. 46. See 2 Wms. Ex'rs, 998, 1038.

³³ *Paine v. Prentiss*, 5 Met. 396. Mr. Justice Hubbard here says: "We are of opinion the statute is to receive a liberal construction. . . . If we should

devise to trustees for the benefit of the testatrix's niece (the income thereof to be paid to such cestui que trust during her life) and to her heirs and assigns for ever, and the cestui que trust died before the testatrix, leaving issue an infant daughter, who survived the testatrix, that the estate vested absolutely in the heirs of the cestui que trust, upon her decease, in fee-simple, the trust being intended solely for her benefit, and that she therefore took no estate under the will, but that her heirs, after her decease, took a fee-simple under the will, as purchasers, the word "heirs" being merely *designatio personarum*.

15. It will be seen from the language of the court in the last case referred to, that the construction of the Massachusetts statute is in some respects different, in terms, from that of the English statute, but not different in substance. And we have had occasion to examine one important question under the statute of Massachusetts, where we came to the conclusion that, notwithstanding the difference in phraseology, the real purport of that statute, and of the English statute upon the same subject, is, in all essential particulars, the same.

16. The case to which we refer was where an estate was bequeathed to a person who died before the testator, leaving more than one child living at the death of the testator, and also the children of another child deceased, living at the death of the testator; she also had other grandchildren living at the decease

* 48 of the * testator, their parents being also living. The question was, who should take the bequest, and in what proportions. It was claimed that all the descendants of the donee living at the decease of the testator should take *per capita*. It was evident that if, by adopting the English construction of the term "issue," the case were to be disposed of the same as if the bequest had been made to the "issue" of the donee, this claim must prevail. But from a careful examination of the statute and of the

adhere to the mere words of the statute, it might be said that the plaintiff (the trustee) should hold the estate for the daughter (of the cestui que trust), and pay to her the income, that being 'in the same manner' the mother was to enjoy the benefit of it. But we are to look at the intention of the testatrix; and when that is ascertained, we are to consider what is the bearing of the statute on the devise. The defendant's title, then, flows directly from the testatrix, by force of the statute, which preserves the legacy, and substitutes the child, as the devisee, in the place of the parent."

more recent English decisions, that where "issue" are allowed to take the share of, and by way of substitution for, the parents, the term is construed as synonymous with children, or those who represent such children as are deceased, and that they thus take per stirpes, and not per capita, and especially from an examination of the decisions in the English courts of equity fixing the construction of the English statute upon the same subject, we could entertain no doubt that the word "issue," in the Massachusetts statute, must be so construed as not to admit children of the donee and their living descendants to take concurrently. There seemed, both from the reasonableness of the thing and the probable purpose and intention of the statute, as well as the English cases bearing upon the question, no serious doubt that the grandchildren, whose parents were living at the death of the testator, must be excluded from all participation in the bequest.

17. The only serious question which it seemed to us could fairly be said to exist in the case was, whether the living children of the devisee should take the whole bequest to the exclusion of the grandchildren, being the children of the deceased child.⁸⁴

⁸⁴ In the Matter of Bush's Estate. After careful examination of the cases bearing upon the construction of the word "issue" in different relations, and especially the more recent decisions, we ventured to express the result of the law thus: "We must conclude, therefore, that the word 'issue' in this statute, being used by way of representation, and with reference to the share of the parent, and to take that share, there can be no question it will and must receive the construction of 'child,' or 'children,' at the very least, and not include all the descendants in being at the time." This is the unquestionable and clearly established rule of the English courts of equity, where "issue" is substituted for parent, or expressly required to take the share of the parent. And in that view the word "issue" is treated as a word of purchase merely, the issue taking under the will instead of by means of the legal representation of the parent.

But when we consider that the word "issue," in the English statute, where it is used for the same purpose as in the Massachusetts statute, in order to prevent a lapse where the devisee or legatee dies before the death of the testator, is construed to mean those heirs of the body, which, as heirs, or under the statute of distributions, represent the devisee or legatee, excluding all the descendants whose ancestor is living, and allowing the children of a deceased child to take concurrently with the surviving children of the earlier generation first representing the donee in the will, and thus to take, by way of representation, per stirpes, and not per capita; and when especially we consider that this is the obvious import of the Massachusetts statute, although not as clearly expressed as in the English statute upon the same subject; we can

* 49 * 18. *Stuart*, V. C., seems to have decided the very question involved in the case last referred to, but arising upon

entertain no reasonable question that the Massachusetts statute will receive the same construction, and the word "issue" be regarded, as it is in many of the cases already cited, as a word of limitation, and not of purchase, and thus allowing only the children of the deceased devisee or legatee, and those who legally represent deceased children, to take the share of such devisee or legatee by way of representation, and not as being entitled directly under the will as purchasers.

I must say, I have no doubt whatever that the grandchildren, being children of living children, must be excluded under the statute from taking concurrently with their parents. And if the terms of the Massachusetts statute were as well adapted to accomplish the end proposed as those of the English statute, I could entertain no more doubt of the admission of the grandchildren who are the children of the deceased child. The framers of the English statute seem to have been more expert in selecting terms precisely adapted to their purpose, and expressly provided that the issue should take as if the devisee had died immediately after the testator; while the framers of the Massachusetts statute, in a more loose and inexpert mode, provide that the issue shall take in the same manner the devisee would have done,—i. e., shall succeed to the share of such devisee or legatee. And this succession or representation could only be effected in the ordinary mode provided by the general law of the state. The American courts are, perhaps, less likely to find embarrassment in construing a statute according to its obvious meaning, while departing somewhat from its terms, than the English courts. And it seems clear to me that the courts of Massachusetts will feel compelled to apply the construction of the English statute, substantially, to their own statute. And if I entertained doubt in regard to the ultimate construction of this statute as to the admission of the children of a deceased child to share with the surviving members of that generation, by way of representation, it is so obviously just, and the weight of authority is so clearly in that direction, that I could not recommend the estate to be settled excluding such grandchildren, until the decision of the courts was obtained upon the point. In the language of Lord *Eldon*, in *Sibley v. Perry*, 7 Vesey, 522, 529: As "I have not the least doubt (in regard) to the actual intention" of the statute, "it is extremely difficult to put any other construction upon it, as a judge, than that which, as an individual, I have no doubt was the meaning." There is a similar statute in Rhode Island. *Moore v. Dimond*, 5 R. I. 121. In *Newbold v. Prichett*, 2 Whart. 46, as before stated, it was held, contrary to the construction of the English statute, that the will had no operation upon the bequest, but that it passed to the "issue" by force of the statute. And most of the similar statutes in the American states have received the same construction as that last named. The devisee is not treated as having survived the testator, in the language of the English statute, but the bequest is carried to the issue by force of the statute. *Mathis v. Hammond*, 9 Rich. Eq. 137; *Clendening v. Clymer*, 17 Ind. 155; *Jones v. Jones*, 37 Ala. 646. See also *Pate v. Pate*,

the construction of a will, where he held, that where there were bequests to L. * for life, and after her death for her * 50 issue, the court would hold that the children of the deceased children of L. were entitled to share with her surviving children in the property.³⁵

19. Under the Pennsylvania statute upon this subject,³⁶ it was held, where the testator directed his bequests to be distributed "share and share alike among the children of my brother Adam, and the children of my brother Martin, and to my sister Barbara," who died before him, leaving children, that the legal statutory form should be applied, and that the legatees should be classified into three classes, and allowed to take, as their parents would have done, *per stirpes*.³⁷

40 Miss. 750, on a similar statute; *Paine v. Prentiss*, 5 Met. 396; ante, § 3, pl. 13; *Johnson v. Johnson*, 3 Hare, 157.

The English statute and that of Pennsylvania are applied to cases where the devisee was dead at the making of the will, *Minter's Appeal*, 40 Penn. St. 111; ante, § 3, pl. 19; and the same construction obtains in some of the other American states. And under the English statute lapse has been saved where the devisee deceases, after the statute came in force, and before the testator, but where the will was made before the statute came in force. *Winter v. Winter*, 5 Hare, 306; *s. p.* *Bishop v. Bishop*, 4 Hill, 138. And in *Taylor v. Conner*, 17 Ind. 114, it seems to be considered that the statute will apply to cases where the devisee was dead before the making of the will. But in *Billingsley v. Tongue*, 9 Md. 575, such a devise is declared void, and not saved by the statute.

The statute of Kentucky on this subject is peculiar, Rev. Stat. 1860, § 18, and saves a lapse when the devisees are severally named, not as a class. In *Dazey v. Killam*, 1 Duvall, 404, *Duvall*, Ch. J., says it is intended only to embrace "certain special and specific classes — devises to several as a class — devises to several as tenants in common — devises to several as joint-tenants," and abolished or cut down the survivorship as well as prevented the lapse. The statutes of some of the states were at first restricted in terms to saving a lapse where the devisee is *named* in the will; as in Maryland, Act of 1810; *Young v. Robinson*, 11 Gill & J. 328. But this act is given a more enlarged operation by that of 1832, ch. 295. Similar statutes to those already named exist in many of the other states; viz., New Jersey, Ohio, Maine, Connecticut, New Hampshire, Vermont, Georgia, Tennessee, and some others probably.

See the recent English case of *Habergham v. Ridehalgh*, 18 W. R. 427.

³⁵ *Louis v. Louis*, 9 Jur. N. S. 244; *s. c.* 7 L. T. N. S. 666.

³⁶ 6th May, 1844.

³⁷ *Minter's Appeal*, 40 Penn. St. 111. In a somewhat analogous case (*Appeal of Gable's Executors*, 40 Penn. St. 231), it was held that grandchildren could not take the share of their parent, under a bequest to the children

20. Upon the question of the proper construction of a bequest to one by name for life, and to the issue of such person's body, in the form which, in regard to real estate, creates an estate tail, there has of late been considerable discussion in the English courts. And it seems now well settled, in England and in some of the American states, that it is entirely allowable to give the same words

* 51 * a different force, as applied to personal estate, from that which, by the established precedents, they must receive, when applied to the conveyance of real estate; that in regard to personal estate a bequest to one for life, and to the issue of such person, by the natural force and import of the terms, creates an estate for life only, in the first donee, and that the issue of such person take the remainder as purchasers.

21. This subject is a good deal discussed by Lord Chancellor *Cranworth*, and the Lords Justices, in a case before the Court of Chancery Appeal,³⁸ and the leading cases cited and commented upon from the earliest times. It was there held that a bequest to a married woman, of an annuity "for her life and the issue lawfully begotten from her body, on failure of which to revert to my

of the testatrix's brothers and sisters. The word "issue" held one of limitation, and synonymous with heirs of the body, unless there are expressions in the will unequivocally indicative of a contrary intention. *Angle v. Brosius*, 43 Penn. St. 187. See *Patterson v. Swallow*, 44 Penn. St. 487; *Snow v. Snow*, 49 Me. 159. But some of the English cases adopt the construction that a bequest to the children of A. and their issue creates an absolute estate in such of the class as are living at the decease of the testator, to the exclusion of their own issue, and the issue of any, which deceased before the testator, thus treating the word "issue" as one of limitation merely. *Butter v. Ommaney*, 4 Russ. 70. There can be little doubt such a construction defeats the ordinary purpose of such a bequest, which may fairly be presumed to be, that the children living at the death of the testator shall take, and that the issue of any deceased child shall be entitled to the share which would have fallen to such deceased child, if living. But there are other English cases following the same construction as the last case named. *Martin v. Swannell*, 2 Beav. 249; *Donn v. Penny*, 19 Vesey, 545; *Parkin v. Knight*, 15 Sim. 83; *Gibbs v. Tait*, 8 Sim. 132. And some English cases take the natural, common-sense view above suggested. *Bebb v. Beckwith*, 2 Beav. 308; *Slade v. Fooks*, 9 Sim. 386. But a bequest to A. and the children lawfully begotten of her body, she having no children at the death of testator, but subsequently having lawful issue, creates an absolute estate in A. *Read v. Willis*, 1 Coll. 86; s. p. *Snowball v. Procter*, 2 Younge & Coll. C. C. 478; s. c. 7 Jur. 619.

³⁸ *Wynch ex parte*, 5 DeG., M. & G. 188; post, § 4, pl. 16, and note 25.

heirs," with a request that K. and C. would act as trustees for such married woman, so that the annuity might be secured for her sole use and benefit, gave her a life-interest only, with a gift in the nature of a remainder to her issue; and that the Court of Chancery, in construing a disposition of personal estate by will, is not to be absolutely governed by rules which would be applicable at law in the case of real estate. The rule laid down by Lord *Thurlow*,³⁹ that in such cases the heirs shall be regarded as taking by purchase and not by limitation, when that is the apparent purpose of the testator, is vindicated and maintained, notwithstanding it has been questioned in many of the subsequent cases.⁴⁰ The same rule was adopted in the construction of a will giving leaseholds for life to A., and after her decease to the issue of her body.⁴¹ But * where there is a gift of the absolute interest in person- * 52 alty to the first donee, he will hold such estate exonerated from all charge, notwithstanding there may be a gift over of the same things depending upon some contingency.⁴²

³⁹ *Knight v. Ellis*, 2 Br. C. C. 570.

⁴⁰ *Lyon v. Mitchell*, 1 Madd. 467, and cases cited. The Lord Chancellor, in *Ex parte Wynch*, supra, cites the following cases: *Tothill v. Pitt*, 1 Madd. 488; s. c. before the House of Lords, 7 Br. P. C. 453; *Elton v. Eason*, 19 Vesey, 73; *Britton v. Twining*, 3 Mer. 176; *Chandless v. Price*, 3 Vesey, 99; *Attorney-General v. Bright*, 2 Keen, 57; *Tate v. Clarke*, 1 Beav. 100; *Jordan v. Lowe*, 6 Beav. 350; *Bird v. Webster*, 1 Drew. 338. And Lord Justice *Turner*, who dissented in some respects from the views of his associates, but came to the same result, cited *Aubin v. Daly*, 4 B. & Al. 59; *Oates v. Cooke*, 3 Burr. 1684; *Trent v. Hanning*, 1 Bos. & Pull. N. R. 116; *Doe v. Woodhouse*, 4 T. R. 89; *Mogg v. Mogg*, 1 Mer. 654; *Dunk v. Fenner*, 2 Russ. & My. 557; *Hockley v. Mawbey*, 1 Ves. Jr. 143; *Darley v. Martin*, 17 Jur. 1125; 13 C. B. 683; *Forth v. Chapman*, 1 P. Wms. 663; *Clare v. Clare*, Cas. temp. Talb. 21; *Warman v. Seaman*, Pollex. 279; *Stafford v. Buckley*, 2 Ves. Sen. 170.

⁴¹ *Goldney v. Crabb*, 19 Beav. 338. See also *Parker v. Clarke*, 6 DeG., M. & G. 104; *Roe d. Dodson v. Grew*, 2 Wils. 322. See also *Hedges v. Harpur*, 3 DeG. & J. 129; *Stewart v. Jones*, 3 DeG. & J. 532.

⁴² *Andrew's Will in re*, 6 Jur. n. s. 114. But see post, § 4, pl. 6, 7, and cases cited. The late English cases adopt many very nice constructions in regard to the application of the word "issue." In *Holgate v. Jennings*, 11 Jur. n. s. 5, s. c. 34 Beav. 79, Sir *John Romilly*, M. R., held that where the residuary estate was given to the testator's nephews and nieces, after the decease of his wife, and if any of them should then be dead, leaving issue, such issue should be entitled to their parent's share, and one of the nephews died leaving issue, who also died before the period of distribution, that the

* 53 * 22. This question came very recently before the Supreme Court of Pennsylvania,⁴³ where it was held that a bequest

issue took no interest in such residue. The learned judge considered that the issue must be in being at the period of distribution, and that the case was much stronger than if the language of the will had been "having left issue." See also, to the same effect, *Re Corrie's Will*, 32 Beav. 426.

And in two modern cases before Vice-Chancellor *Kindersley*, these refinements are carried great lengths. In *Lamphier v. Buck*, 11 Jur. n. s. 837, s. c. 2 Drew. & Sm. 484, the testator gave the residue of his estate for life, and in the event of the children of the tenants for life dying before the parent, or after, and under age without lawful issue, then the trustees were directed to divide such residue equally among all the testator's nephews and nieces who should be living at such time or times, "and to the issue of such of them as may be then dead, such issue to be entitled to its parent's share only." One of the nieces died unmarried. It was held, there was sufficient indication of intention that the gift over should take effect; that "issue" meant children; that the gift to the issue of deceased nephews and nieces was original, and not substitutionary; that whether original or substitutionary, the issue need not survive the tenant for life, in order to entitle them to take; nor need they have survived their parents, where the gift to them was original, but otherwise where it was substitutionary; and that the gift to the issue was in joint tenancy. The other case is that of *Turner in re*, 5 Am. Law Reg. n. s. 234; 2 Drew. & Sm. 501, where it was decided that if the gifts to "issue" were substitutionary, such issue must survive their parents, in order to take. See also *Hurry v. Hurry*, L. R. 10 Eq. 346. The following comment upon the conflict of opinion upon this point, from the London Solicitors' Journal, may be worthy of perusal, as a brief summary of the cases upon the point: "As there has been much conflict of judicial opinion upon this point, it may be well to give, in brief chronological order, the results of the various reported cases. In *Pearson v. Stephen*, 5 Bl. 203 (1831), it was assumed, without argument (the time not having arrived for deciding the point), that in a so-called independent gift, viz., to A. for life, remainder to the five sons of the testator living at the death of A. and their respective issue, no issue of a deceased son could take who did not survive the tenant for life. In *Bennett v. Merriman*, 6 Beav. 360 (1843), where the gift was substitutionary, Lord *Langdale* held that the words of contingency, expressed in the case of the parents, ought to be implied in the case of the issue. A similar conclusion was arrived at by Lord Justice *Knight Bruce* (then Vice-

⁴³ *Emma J. Meyer's Appeal*, Legal Intel. March 10, 1865. The question how far children and grandchildren, named by classes, take per capita, is discussed in *Herneisen v. Blake*, 1 Philadelphia, 131. The expression, to be equally divided between my said grandchildren, their respective heirs and assigns, requires the individuals to take per capita. *Ibid.*; *Bender's Appeal*, 3 Grant's Cas. 210. See also *Gold v. Judson*, 21 Conn. 616; *Lee v. Lee*, 3 Am. Law Reg. n. s. 59; 39 Barb.

in the will of *the father of the appellant, the effective * 54 words of which were, "I give and bequeath," "in trust for

Chancellor), in *Macgregor v. Macgregor*, 2 Coll. 192 (1845), in the case of a gift independent in point of form. In both these cases there were directions that the issue should only take their parents' share. On the other hand, in *Lyon v. Coward*, 15 Sim. 287 (1846), Vice-Chancellor *Shadwell* held that where the gift to the issue was independent in point of form, the contingency ought not to be implied. It is to be observed that *Macgregor v. Macgregor* was not cited in this case. In *Masters v. Scales*, 13 Beav. 60 (1850), Lord *Langdale* refused to import the contingency into a substitutionary gift. Vice-Chancellor *Parker* followed *Lyon v. Coward* in *Barker v. Barker*, 5 DeG. & Sm. 753 (1852), as did also Vice-Chancellor *Kindersley* in *Harcourt v. Harcourt*, 5 W. R. 478 (1857), and Vice-Chancellor *Wood* in *re Bennett's Trust*, 3 K. & J. 281 (1857), all cases of gifts to issue, independent in point of form, coupled with directions that the issue should take their parents' shares only. In *Penny v. Clarke*, Johns. 619 Eng. Ch., Vice-Chancellor *Wood* decided in the same way in a precisely similar case of independent gift, and his decision was confirmed on appeal to the Lord Justices (8 W. R. 286; 1 DeG., F. & J. 425), in consequence of Lord Justice *Turner* concurring in the view of the judge in the court below. Lord Justice *Knight Bruce* differed, considering that his opinion, as expressed in *Macgregor v. Macgregor*, ought also to be applied in the case of gifts in a so-called independent form. In *Crause v. Cooper*, 1 J. & H. 207, Vice-Chancellor *Wood* hinted (the point did not call for a decision), that a different rule should be applied in the case of a purely substitutionary gift, and that there the contingency which was expressed in the gift to the parents should be implied in the gift to the issue. In *re Wildman's Trust*, 1 J. & H. 299 (1860), Vice-Chancellor *Wood* considered the bequest to be an independent gift to the issue, and refused to import words of contingency. A similar conclusion was arrived at in *Pell's Trust*, 9 W. R. 733, 3 DeG., F. & J. 291 (1861), where, in a case of independent gift, Lord Justice *Turner* approved of the decision of Vice-Chancellor *Stuart* in the court below. Lord Justice *Knight Bruce* still adhered to the principle of his decision in *Macgregor v. Macgregor*. In *Humfrey v. Humfrey*, 10 W. R. 286, 2 Dr. & Sm. 49 (1862), Vice-Chancellor *Kindersley* considered himself bound by previous authorities to hold that, in a case of independent gift to issue, those who predeceased their own parent, as well as the tenant for life, were excluded. Lastly, *Re Corrie's Will*, 32 Beav. 426, and *Holgate v. Jennings*, 34 Beav. 79, the present Master of the Rolls, in cases of substitutionary gifts, approved and followed the decision of Lord Justice *Knight Bruce* in *Macgregor v. Macgregor*. The result of the consideration of these authorities is that Lord Justice *Knight Bruce* considers that the words of contingency, expressed in the gift to the parents, ought to be implied in the gift to the children, whether the gift be, in form, independent or substitutionary; that Sir *John Romilly* considers that they ought to be implied in cases of purely substitutionary gifts; that Lord *Langdale* was of opinion that they ought not to be implied in cases of substitutionary gifts; that Vice-Chancellor *Leach*, Vice-Chancellor *Shadwell*, Vice-

the use of my daughter, E. J. S., during life, and after her decease, for such issue, if any, as she may leave," created an estate for life in the first donee, with remainder to her issue, who took as purchasers under the will. The subject is here very extensively considered, and the authorities discussed by *Read*, J. In this case the bequest was to trustees, who were directed to pay the interest to the daughter, in monthly instalments, from the death of the testator, thus rendering the construction more unquestionable than where trustees are not interposed.⁴³

23. In a somewhat recent case in Maryland⁴⁴ it was declared, that in a will the word "issue" is not to be regarded as a technical expression, *prima facie* operating by way of limitation upon the title of the devisee or legatee, but that its force will be controlled by the apparent intention of the instrument, to be collected from the words used with reference to the subject-matter, and such other attending circumstances as are admissible in aid of the construction; but that in a deed or grant this degree of relaxation is not admissible.

24. In the case of *Pinckney v. Pinckney*,⁴⁵ it was held that * 55 the * word "heirs" in a will should have the force of issue, in a clause of limitation over. And in *Moye v. Moye*,⁴⁶ the word "increase" was held to include children and grandchildren, and to be synonymous with issue of the body..

25. The cases in the American states are very numerous where the expression "without issue" has been held equivalent to "without leaving issue," and as implying an indefinite failure of issue.⁴⁷

Chancellor *Parker*, Lord Justice *Turner*, Vice-Chancellors *Kindersley*, *Stuart*, and *Wood*, have decided against the implication in cases of independent gifts, but that Vice-Chancellor *Wood* doubted the propriety of extending this decision to the case of gifts by way of substitution.

"Vice-Chancellor *Kindersley* has decided, in the principal cases, that, in gifts of the character in question, there is no distinction between (so-called) independent and substitutionary gifts, but that words of contingency pointing to the necessity of surviving the period of distribution, which are expressed in the bequests to the parents, are not to be implied in the bequests to the issue. We trust that the decision in this respect will be acquiesced in, and that this point may be considered as now settled."

⁴⁴ *McPherson v. Snowden*, 19 Md. 197.

⁴⁵ 1 Bradf. Sur. 269, 274.

⁴⁶ 5 Jones, Eq. 359.

⁴⁷ *Wilson v. Wilson*, 32 Barb. 328; *Du Bois v. Ray*, 7 Bosw. 244. See

26. Where an estate is given for life, and the remainder to the "issue," and the gift is accompanied by words of distribution, and by words which would convey an estate in fee or in tail to the issue, the interest of the first taker is limited to an estate for life, and that whether the estate to the issue is given in fee or in tail by the usual technical words, or by implication.⁴⁸

SECTION IV.

THE HEIR AS PURCHASER. THE WORD "HEIR" AS EQUIVALENT TO NEXT OF KIN.

1. Devise to heirs creates an estate in fee-simple.
2. To heirs of the body creates an estate in tail.
3. Where the word "heir" or "heirs" is used, as *designatio personarum*, creates only an estate for life.
4. The nice refinements in the English law affecting estates tail, not useful here.
5. Bequest of personalty to A., and if he die before testator, to his heirs, will go to the next of kin.
6. A bequest to one and his issue creates an estate tail in the realty, but an absolute gift of personalty.
7. Statement of the case of *Ex parte Wynch*.
8. The point decided in *Tothill v. Pott*.
9. Heirs of the body, and issue, receive same construction.
10. *Knight v. Ellis* reviewed and approved.
11. Lord Justice *Turner's* review of the cases.
12. Sir *John Romilly's* review of the cases.
13. Some of the more recent cases stated.
- * 14. The present state of the English law. * 56
15. Gift of personalty to be at the disposal of donee.
16. The word "heir," or "heirs," often used to designate next of kin, as to personalty.
17. Difference between bequest to one, or "heirs," or to one, or "executors," &c.
18. Where real and personal estate blended, "heir" will receive same construction.
19. In America real and personal estate descend, generally, to same persons.
20. Case in North Carolina showing that heir may take as purchaser.
21. Case in Connecticut where "heirs" allowed to take as purchasers.
22. Cases in Pennsylvania and Tennessee to same effect.
23. Similar case in New York. Contingent remainders. Cases in Maine.
24. A fund subject to appointment which fails in part.

also *Paterson v. Ellis*, 11 Wend. 259, 278; *Dumond v. Stringham*, 26 Barb. 104; *Norris v. Beyea*, 13 N. Y. 273; *Albee v. Carpenter*, 12 Cush. 382; *Kay v. Scates*, 37 Penn. St. 31; *Lapsley v. Lapsley*, 9 Penn. St. 130; *Arnold v. Brown*, 7 R. I. 188; *Manchester v. Durfee*, 5 id. 549; *Burrough v. Foster*, 6 id. 534.

⁴⁸ *Bradley v. Cartwright*, Law Rep. 2 C. P. 511; s. c. 15 W. R. 922.

§ 4. 1. A DEVISE of real estate to the testator's heirs, in the plural number, is now universally regarded as creating a fee-simple in those persons who answer the denomination of legal heirs at the decease of the testator.¹ But in *Chambers v. Taylor*,² Lord *Cottenham* held, that a devise "to the heir female" created only an estate for life.³ His lordship here said, "These cases, indeed, prove that the word 'heir,' in the singular number, has sometimes the same effect as the word 'heirs' in the plural; but if words of limitation are superadded to the word 'heir,' it is considered as conclusively showing that the word is used as a word of purchase. When that is not the case, it is considered in construing wills as nomen collectivum, for the purpose of creating an estate tail in the first taker, and not as creating an estate tail in the person answering the description of heir. If the word 'heir' would per se give an estate of inheritance to the party answering the description, there would be no reason for any distinction, whether words of limitation or inheritance were or were not superadded."

2. It seems to be well settled that a devise to the heirs of the body of another, or of the testator, creates an estate tail, and one which will continue indefinitely, unless cut off.⁴

* 57 * 3. It is apparent that where the word "heir" is used in the singular number only, or whether used in the singular or plural number, if it is so used as to indicate, with reasonable probability, that the term is adopted merely as a designatio personarum, it will only create an estate for life in real estate.⁵

4. As estates tail are not favored in this country, but are in fact either prohibited, or very essentially limited and curtailed, in the organic law of many of the states, it scarcely seems desirable to

¹ *Burchet v. Durdant*, Skin. 206; *Mounsey v. Blamire*, 4 Russ. 384.

² 2 My. & C. 376.

³ His lordship here said, "In so holding I am following the more modern authorities, and am not violating any rule to be found in the older cases, and I have no doubt that this construction carries into effect the real intention of the parties." *Winter v. Perratt*, 9 Cl. & Fin. 606, 614, 616; *Doe d. Sams v. Garlick*, 14 M. & W. 698.

⁴ *Mandeville's Case*, Co. Litt. 26 b; 2 *Jarman* (1861), 56; *Southcot v. Stowell*, 1 Mod. 226, 237; s. c. 2 Mod. 207, 211; s. c. *Freem.* 216, 225; *Wills v. Palmer*, 5 Burr. 2615; *Wright v. Vernon*, 2 Drew. 439; s. c. 7 Ho. Lds. Cas. 35; s. c. 4 Jur. n. s. 1113. This subject is extensively discussed in the late case of *Allgood v. Blake*, L. R. 8 Exch. 160.

⁵ See cases named in note 4.

incumber our pages with an enumeration of the nicer distinctions which have obtained in the English courts, in regard to devises in different forms, more or less nearly connected with estates tail. The learning upon this curious subject will be found carefully digested in the last English edition of Mr. Jarman's valuable treatise upon Wills.⁶

5. Some questions have arisen in the English courts, where gifts over of personal estate are made to the heirs of the first donee, or to the heirs of some other person by name, as to what precise construction should be given. It was held in *Vaux v. Henderson*,⁷ that a legacy to A., "and, failing him by decease before me, to his heirs," and A. dies before the testator, having made a will containing a residuary clause, the legacy belonged to the next of kin of A. living at the time of the testator's death. And the same rule was adopted in a later case.⁸

6. It seems to be settled, notwithstanding some contradictory decisions, that upon a bequest to one and his issue, the donees will take an estate tail in real property, but the absolute property in personalty.⁹ The Master of the Rolls, Sir *William Grant*, here

⁶ 2 Jarman (1861), 58-71.

⁷ In note to *Horseman v. Abbey*, 1 Jac. & Walk. 388.

⁸ *Gittings v. M'Dermott*, 2 My. & K. 69. This rule seems to have been adopted upon the presumption that the testator intended the property to go in the same direction, if the first donee died in his lifetime, as if he had survived him and taken the property under the will. This is surely a very reasonable construction, and one that was incorporated into the late English Wills Act, 1 Vic. ch. 26, § 33, and has been applied in many of the late cases. *De Beauvoir v. De Beauvoir*, 3 Ho. Lds. Cas. 524, 557; *Doody v. Higgins*, 9 Hare, App. XXXII., *Jacobs v. Jacobs*, 16 Beav. 557; *In re Porter's Trusts*, 4 Kay & J. 188. So also in the American courts. *Corbitt v. Corbitt*, 1 Jones, Eq. 114. See *Steevens' Trusts*, L. R. 15 Eq. 110, where a bequest of the remainder of personalty, to be divided "amongst the heirs of my late brother," is held to import the next of kin under the statute of distributions, together with the widow. And in *Cushman v. Horton*, 59 N. Y. 149, where \$2,000 was bequeathed to one for life, and then to the "lawful heirs" of another; the latter having survived both the testator and the life-tenants, it was held that the income of the fund would go to the residuary legatee until the decease of him whose heirs were entitled in remainder, when the same would vest in such persons as should be his "lawful heirs;" and that these words must receive their primary and natural construction, unless there was something in the words of the will, when viewed in connection with the surrounding facts, to indicate a different intent.

⁹ *Donn v. Penny*, 19 Vesey, 545. It is here said, that the natural sense of

* 58 * held that a bequest of the testator's property, real and personal, after the decease of his wife, to A. and his male issue; "for want of male issue after him" to B. and his male issue; "for his want of male issue" to two others and their male issue; that an absolute interest, as to the personal estate, vested in A., but that a limitation over, for want of issue living at his death, is good. The more recent cases have adhered to the same rule.¹⁰ And even the superadding of words indicating a purpose in the mind of the testator, that the estate shall be distributed among the issue, as where there was a bequest over, amongst all the testator's brothers and sisters, "and to their issues, male and female, after the respective deceases of his said brothers and sisters, for ever; to be equally divided between and among them;" it was held that the words "issue, male and female," were to be construed as words of limitation, and not of purchase, and that the children of a sister of the testator, who died in the lifetime of the first donee, took no interest under the bequest.¹¹

7. This subject came under consideration in the Court of Chancery Appeal, before the Lord Chancellor, Lord *Cranworth*, and the Lord Justices, in a late case,¹² where the whole subject, and many of the cases, were extensively reviewed by those learned judges. And although we do not understand that the former decisions, or

the words "die without issue" or "for want of issue," is not to be departed from without satisfactory evidence that they were not intended in that sense. See also *Crawford v. Trotter*, 4 Madd. 361; *Martin v. Swannell*, 2 Beav. 249. The same rule of construction is adopted in many of the American states. *Albee v. Carpenter*, 12 Cush. 382; *Clark v. Clark*, 2 Head, 336. In some of the states all distinction between estates in fee-simple and in tail is abolished, by providing that all estates tail shall be construed as estates in fee-simple, where it is held that the terms "heirs of the body," and all similar expressions, create estates in fee-simple. *Johnson v. Johnson*, 2 Met. (Ky.) 331. But see ante, § 3, pl. 20, 21, and cases cited, where it will appear that the more recent English cases have inclined more of late to allow the issue in such cases to take any remaining estate undisposed of by the first takers, as purchasers, by way of executory devise; but the rule stated in the text seems to be more in accordance with the general spirit of the American institutions, and more conformable to the decisions of the courts here. See post, pl. 7, 8, 9, 10 et seq., where the more recent English cases are fully reviewed.

¹⁰ *Parkin v. Knight*, 15 Sim. 83. See also *Butter v. Ommaney*, 4 Russ. 70; *Pearson v. Stephen*, 2 Dow & Cl. 328; *Gibbs v. Tait*, 8 Sim. 132.

¹¹ *Tate v. Clarke*, 1 Beav. 100.

¹² *Ex parte Wynch*, 5 DeG., M. & G. 188.

the principles embraced in them, were essentially qualified, it may be said that the rule of law in regard to personalty is there more * clearly defined than in any of the former cases. His * 59 lordship said, —

8. “The first class of cases is that in which the gift, after the gift to the first taker, is to the heirs of the body. In those cases, the courts have held, on analogy to devises of real estates, that the words are so clearly words of limitation, that even the express restriction of the first bequest to a life-estate is not sufficient to exclude their *prima facie* meaning.” His lordship then refers to the cases under this point.¹³ “In these cases,” said the learned judge, “the principle on which the courts went was this, — that technical words were used, which indicated a clear meaning on the part of the testator that the property should go in a course of devolution till there was an exhaustion of the heirs of the body, and, as that of course could not be carried into effect, they gave an absolute interest.”

9. “In the cases just mentioned the words were ‘heirs of the body,’ which, as we know, are technical words almost mysteriously inflexible. But in cases also where the more manageable expression ‘issue’ occurred, still, where there was nothing to show that the word was not intended as a word of limitation, or an intention to confine the first taker to a life-estate, it has been held to be in the nature of a word of limitation, where used with reference to personal estate.” The cases are then enumerated under this phase.¹⁴ “So also where there is no express gift to the issue, but after an indefinite gift there is a gift over, in default of issue of the first taker, then the first taker in the case of real estate is considered, by implication, to take a gift to him and his issue, and the same rule has been adopted in regard to personalty,” and an absolute interest has been held to vest.¹⁵

10. His lordship then recurs to the much-questioned case of *Knight v. Ellis*,¹⁶ where the testator gave the accumulation of rents till H. should attain twenty-one, to be laid out, and to permit A. to receive the interest during life; and after his death he gives the said moneys to the issue male of A., and in default to the

¹³ Ante, § 3, n. 40.

¹⁴ *Lyon v. Mitchell*, 1 Madd. 467. We have already referred to others on this point. Ante, § 3, n. 40 et seq.

¹⁵ *Chandless v. Price*, 3 Vesey, 99.

¹⁶ 2 Br. C. C. 570.

plaintiffs. A. died without issue. It was held by Lord * 60 *Thurlow* * that the issue would have taken as purchasers, and that therefore the limitation to the plaintiff takes effect. Lord *Cranworth* says, in regard to this case, Lord *Thurlow* "gave effect to the manifest intention, not thinking himself fettered by the analogy of a real estate, where the result would have been arrived at on principles not founded on intention, but often operating in direct opposition to it. I cannot consider that case as having been overruled; I believe it to have been rightly decided."¹⁷

11. Lord Justice *Turner*, after a very patient consideration of all the questions arising in the case, and a thorough review of the decided cases bearing upon them, arrived at the conclusion that *Knight v. Ellis* had not been overruled; "and if it is to be overruled," said his lordship, "it must be by higher authority than any which I possess." His lordship thus summed up the results of his judgment: "That the same words may receive a different construction as to real and personal estate;"¹⁸ that *Knight v. Ellis* was much more conformable to the testator's intention than the opposite construction which had been contended for in that case; and that it was supported by the early cases.¹⁹

12. This whole subject²⁰ is again very carefully reviewed, so late as December, 1859, by an able and experienced equity judge, Sir *John Romilly*, M. R., wherein the learned judge substantially said: I concur in *Ex parte Wynch*, which is a valuable decision, and does not conflict with any previously decided cases.

¹⁷ The cases which have been regarded as questioning or contradicting *Knight v. Ellis* are *The Attorney General v. Bright*, 2 Keen, 57; *Tate v. Clarke*, 1 Beav. 100; *Jordan v. Lowe*, 6 Beav. 350; *Bird v. Webster*, 1 Drew. 338; which were all carefully reviewed by the Lord Chancellor in *Ex parte Wynch*, and held not to have affected the authority of *Knight v. Ellis*; and that, in the construction of a will governing the disposition of personal estate, the court were not tied down by any nice analogies to the rules governing the transmission of real estate, but that the court "is merely to look at the language used in order to ascertain the intention of the giver."

¹⁸ *Forth v. Chapman*, 1 P. Wms. 663.

¹⁹ *Clare v. Clare*, Cas. temp. Talb. 21; *Warman v. Seaman*, Cas. temp. Finch, 279; Pollex. 112. See also *Goldney v. Crabb*, 19 Beav. 338, where the same rule was adopted in the construction of a will giving leaseholds for life to A., and, after her decease, to the issue of her body. See also *Parker v. Clarke*, 6 DeG., M. & G. 104; *Roe d. Dodson v. Grew*, 2 Wils. 322; *Hedges v. Harpur*, 3 DeG. & J. 129; *Stewart v. Jones*, 3 DeG. & J. 532.

²⁰ *Andrew's Will*, in re, 27 Beav. 608; s. c. 6 Jur. n. s. 114.

It points out what would be the result if a life-estate were clearly * given." There is here "an absolute interest with a * 61 gift over. The testator probably supposed that the law would give effect to the gift over, but in fact it is inoperative. . . . Neither *Knight v. Ellis* nor *Ex parte Wynch* shakes the proposition that this is an absolute gift. The way in which the court deals with such gifts of personalty is this: The testator intends a gift to the children, but the law construes it as an absolute gift to the parent, leaving it to the discretion of the parent to make a provision for the children. If there were a clear life-estate given, I could follow *Ex parte Wynch*, but there is not."

13. This subject has been more or less touched upon in a considerable number of very recent cases, many of which are not yet reported in this country in the regular series of the equity reports. In case of a bequest of personal property to A., to spend both principal and interest, or any part during his lifetime, should A. not spend the property which was left for him, it was to be equally divided between C. and D. Held, that A. took an absolute estate in both principal and interest.²¹ Where an absolute interest is given by a will, it will not be cut down except by distinct words.²²

14. The final result at which the English courts seem to have arrived is, that where there is a clear gift of personalty, and a gift over in default of issue, or where the gift is to one and his heirs, or the heirs of his body, or his issue, it shall be held to vest an absolute estate in the first donee, unless there is a clear expression of intention, that the first donee shall take only a life-estate, in which case the issue or heirs, if provided to take after the termination of the life-estate, will take as purchasers, and not by way of limitation. This is unquestionably entirely in concurrence with the views of the American courts, and will commend itself to general acceptance with the profession here.

15. It would seem that where a gift is made of personal estate, to be at the disposal of the donee during her natural life, or as long as she remains the widow of the testator, that this sufficiently evinces an intention to place the estate in the absolute disposal of

²¹ *Henderson v. Cross*, 7 Jur. N. S. 177; S. C. 9 W. R. 263. See also *Howorth v. Dewell*, 29 Beav. 18; *Salmon v. Salmon*, 29 Beav. 27.

²² *Adshead v. Willetts*, 9 W. R. 405.

the donee during life, and that, as to personal estate, it implies the right to dispose of the same by sale or gift.²³

16. Questions in regard to personal property have often
* 62 arisen in * the construction of wills, whether the word "heir"

or "heirs" was used in its strict literal import, or in a more general sense, as indicating the next of kin, or those persons to whom the property in question would go, independent of the provisions of the will. This point is somewhat extensively examined, and the cases discussed, in *Doody v. Higgins*,²⁴ and the conclusion reached, that where the word "heir" or "heirs" occurs in a will, by way of indicating succession to property, it is to receive a construction "according to the nature of the property." When therefore these terms are used in a will, affecting personal property, they will be held equivalent to next of kin, and as including those persons who would take the estate under the statute of distributions.

17. In a late case²⁵ it was decided that where the will gives

²³ *White v. White's Ex'rs*, 21 Vt. 250.

²⁴ 2 Kay & Johns. 729. In this case the learned judge, Vice-Chancellor *Wood*, referred to the following cases in confirmation of the proposition stated in the text: *Lowndes v. Stone*, 4 Vesey, 649; *Lord Cottenham*, in *Withy v. Mangles*, 10 Cl. & Fin. 215, 253; *Jacobs v. Jacobs*, 16 Beav. 557; *Gittings v. M'Dermott*, 2 My. & K. 69; s. c. on Appeal, id. 74; *Low v. Smith*, 2 Jur. n. s. 344.

²⁵ *In re Porter's Trust*, 4 K. & J. 188. The learned judge here reviews the cases bearing upon the question. *Bone v. Cook*, McLel. 168; *Ive v. King*, 16 Beav. 46; *Corbyn v. French*, 4 Vesey, 418; *Tidwell v. Ariel*, 3 Madd. 403. In *re Philips' Will*, L. R. 7 Eq. 151, there was a direction in the will, that, after the death of the testator's wife, a bequest to her "should be divided among his children then living, or their heirs," it was held that where two of the children were dead at the date of the will, and three survived the testator, but died in the lifetime of the wife, the heirs of all the children who predeceased the wife were entitled to share with those who survived her, and that heirs meant statutory next of kin, and that such next of kin of the children who predeceased the testator were to be ascertained as of the time of the decease of the testator; and of the others, as of the time of the decease of each child. s. p. In *re Potter's Trust*, L. R. 8 Eq. 52; *Finlason v. Tatlock*, 18 W. R. 332; *Parsons v. Parsons*, L. R. 8 Eq. 260; *Adams v. Adams*, L. R. 14 Eq. 246. But see *Hunter v. Cheshire*, L. R. 8 Ch. App. 751. But before this Vice-Chancellor *Wood*, in *re Jeaffreson's Trusts*, 12 Jur. n. s. 666, s. c. L. R. 2 Eq. 276, held, after careful review of the former cases, that a bequest of personalty to trustees for the separate use of A. B., the testator's daughter, for life, with remainder to the trustees for the benefit of the heirs of the body

a * legacy to one or "his heirs," it shows the testator in- * 63 tended the persons he designates, as heirs, to take by way of substitution, whenever the person first named dies ; and hence, if he dies in the lifetime of the testator, there shall be no lapse. But it is held in the same case, in conformity with the earlier cases cited, that where there is a bequest to A. for life, and after his decease to B. or his executors, or to B. or his personal representatives, it is simply another way of giving a vested interest to B. upon the death of the testator, and if B. die before the testator the bequest shall lapse.

18. But where real and personal estate is blended in the same bequest, there seems an inconsistency in giving the word "heir" or "heirs" a different import with reference to different subject-matters combined in the same general disposition. This difficulty is referred to in some of the earlier cases.²⁶ But the question was thoroughly reviewed, and all the cases bearing upon the point considered, in the case of *DeBeauvoir v. DeBeauvoir*,²⁷ and the rule fully established, that in all such cases the word "heir" or "heirs" must receive its natural and ordinary import and construction. Lord *St. Leonards*, after questioning the general rule that the word "heir" or "heirs" may be construed to mean the person or persons intended by the will to take the share given, in the first instance to the ancestor, or predecessor, according to the nature of the property, whether such as passes under the statute of distributions, or by succession, thereby indicating a succession by way of substitution, thus concludes : "Then we come to the mixed cases. I quite agree that as to them the argument is still stronger against the appellant (the next of kin), for if the law is settled, when you

of A. B., first, to educate the said heirs, and secondly, to pay them the residue at the age of twenty-one years, in such proportions as A. B. should appoint, must be held to create a life-use in A. B., and an absolute estate in her next of kin, at her decease, being her descendants. And A. B. having appointed £100 to a stranger to the power, and the remainder according to the power, except that the balance, being £260, should be applied in payment of her debts; and should any balance remain, she gave it to C. D., one of the objects of the power; it was further held, that, under the ultimate gift, C. D. was entitled to the £260, the charge failing, but not to the £100. See also *Hall v. Woolley*, 18 W. R. 129; *In re Hotchkiss' Trusts*, L. R. 8 Eq. 643.

²⁶ *Wright v. Atkyns*, Coop. 111, 128; s. c. 17 Vesey, 255; 19 id. 299; *Turn. & Russ.* 143; Lord *Cottenham*, in *White v. Briggs*, 2 Phill. 583, 590.

²⁷ 15 Sim. 163; s. c. on Appeal, 3 Ho. of Lds. Cas. 524, 557.

can collect the intention as to personal estate, the argument that it is so must, a fortiori, have more operation when you come to blended property, consisting of real and personal estate; for as to so much of the property which consists of real estate there can be no doubt or question but that the person who is described as 'heir' is intended to take in that character. You therefore, at once, in speaking of heir, impress upon the gift, or upon him who is to take it, his own proper character, that of heir. When you are dealing therefore with the same disposition, though of another part of the property, you

* 64 are relieved * from the difficulty which you labor under in the mere naked case of personal property, and having found that the testator meant what he has expressed, as regards that portion which is real property, you may more readily infer the same intention, as regards the other portion of the same gift, depending upon the same words, and you, therefore, allow the whole disposition the same operation as you would give to it if it had been confined to real estate alone." The same view had been taken by Sir *William Grant*, M. R., in an earlier case.²⁸ But we must con-

²⁸ *Gwynne v. Muddock*, 14 Vesey, 488. The same rule was adopted by the court in *Tetlow v. Ashton*, 15 Jur. 213; s. p. in *Clarke v. Cordis*, 4 Allen, 466, where the question is very carefully examined by *Bigelow*, Ch. J; *Smith v. Harrington*, 4 Allen, 566; *Lombard v. Boyden*, 5 Allen, 249; *Loring v. Thorndike*, id. 257; *Houghton v. Kendall*, 7 id. 72, 76; s. p. *Boydell v. Golightly*, 9 Jur. 2; 14 Sim. 327. In Pennsylvania the expression, "all the heirs," in a will, was held to import the heirs of the testator, and that these could only be ascertained by resorting to the statute of distributions. And as the testator had children, and deceased children leaving issue, entitled to their share by representation, it was also held that his children and grandchildren per stirpes were entitled under the will. *Baskin's Appeal*, 3 Penn. St. 304. A bequest of residue being made to all testator's heirs and all his wife's heirs, share equal, share alike, and the heirs of the husband being a brother, sister, and the child of a deceased sister, and the heirs of the wife being three children of a deceased brother, it was held that the latter took as immediate legatees, and not as representing their father, and that they were therefore entitled to one-half of such residue. *Witmer v. Ebersole*, 5 Penn. St. 458. So where a bequest was made, in 1819, to testator's natural heirs and their heirs for ever, and the testator deceased in 1837, it was held, that those entitled to take were the same persons entitled under the statute of distributions at the decease of testator. *Wood's Appeal*, 18 Penn. St. 478. In *Evans v. Salt*, 6 Beav. 266, "heirs of B." construed next of kin. On a bequest to the "heirs" of A. and to the "children" of B., it was held the latter explained the former, and both meant children. *Loveday v. Hopkins*, Amb. 273. It was held at an early day that a bequest to B. and his heirs male, equally to be divided among them, share and

fess that this reasoning seems to * us rather forced, and not * 65 entirely satisfactory. There are many cases where the same identical words receive a different construction as to different subjects named in the same sentence. And the precise view

share alike, would give B. the interest, and the principal to his heirs male. *Law v. Davis*, cited 1 Ves. Jr. 145; *Wilson v. Vansittart*, Amb. 562. Bequest to one or his heirs, the heirs take by substitution, where he predeceases the testator. *Price v. Lockley*, 6 Beav. 180. Bequest to one, and after his death to his heirs, gives him a life-estate, and the remainder to his heirs. *Gompertz v. Gompertz*, 2 Phil. C. C. 107; *Symers v. Jobson*, 16 Sim. 267. Bequest to testator's "next nearest heir and son," held void for uncertainty. *Thomason v. Moses*, 5 Beav. 77. So also of a bequest to T. P. and his heirs, executors, administrators, and assigns, when T. P. died before the testator. *Waite v. Templer*, 2 Sim. 524. But this seems more like a lapsed legacy, unless the statute would give it to the issue of T. P.; and that would have been the opinion of the court, except that there were so many different classes of substitutes for T. P. named. But really these were words of limitation, and not of purchase, and the "issue" might take under the English statute. "Lawful heirs" construed heirs of the body. *Harris v. Davis*, 1 Coll. C. C. 416. "All my heirs according to the statute of distributions" means those entitled under such statute. *Croom v. Herring*, 4 Hawks, 393. In a bequest to the heirs of A., B., and C., A. being deceased, gives an estate to the heirs of each per capita. *Ward v. Stow*, 2 Dev. Eq. 509. "Heirs of the body" embraces children, whether born before or after the date of the will, if before the death of testator. *Bullock v. Bullock*, 2 Dev. Eq. 307. "Heirs of the body, but no further," construed children. *Vaughan v. Dickens*, 2 Dev. & Batt. Eq. 52. "Heirs of the body, and their heirs and assigns for ever," construed to include children and the children of deceased children, per capita. *Lemacks v. Glover*, 1 Rich. Eq. 141. In Ohio, a bequest to the testator's heirs must be distributed precisely as if there had been no will. *Ferguson v. Stuart*, 14 Ohio, 140; *Brasher v. Marsh*, 15 Ohio, N. S. 103. The same rule is adopted in *Clark v. Lynch*, 46 Barb. 68, unless there are clear indications of a different purpose. "Heirs" construed next of kin, under peculiar circumstances. *Rusing v. Rusing*, 25 Ind. 63. In Pennsylvania, it seems to be regarded as the more natural effect of a bequest to heirs, that they are to take by descent, and not by force of the will. The force of such a bequest there seems to be precisely equivalent to no disposition at all, leaving the law to take its course. *Physick's Appeal*, 50 Penn. St. 128. But the rule is recognized as being different in England, where the heirs are more commonly recognized as taking as purchasers, or by force of the will. *Jacobs v. Amyatt*, 4 Br. C. C. 542; *Ogle v. Corthorn*, 9 Jur. 325. See also *Eby's Appeal*, 50 Penn. St. 311. But a bequest to the heirs of a particular person is commonly construed as giving the same estate as if the legatees took by distribution. *Rand v. Sanger*, 115 Mass. 124.

suggested in the last sentence has been recently taken by a distinguished equity judge, Vice-Chancellor *Giffard*.²⁹

19. In the American states the real and personal estate of intestates, in general, goes to the same persons, thus rendering the distinction which occupies so much space in the English treatises, upon the settlement of estates between heirs and next of kin, of very little practical consequence.³⁰ And in most of the states both real and personal estate is distributed, in case of intestacy, * 66 according to the provisions of the English statute of distributions,³⁰ with the exception of the widow, who takes a life-estate in one-third of the real estate, and the absolute property in one-third of the personal estate. The half-blood, generally, take equally with the whole blood, as they do under the English statute of distributions. Chancellor *Kent* says:³¹ "Such a uniform rule in the descent of real and personal property gives simplicity and symmetry to the whole doctrine of descent. The English statute of distributions being founded in justice, and on the wisdom of ages, and fully and profoundly illustrated by a series of judicial decisions, was well selected as the most suitable and judicious basis on which to establish our American law of descent and distribution."

20. We shall certainly not attempt to give a full digest of the American cases upon this point, as they follow very nearly the principles already indicated, with this difference, that the heir is more readily permitted to take as purchaser, than in the English courts. In North Carolina³² a bequest to the testator's wife for life, and at her death to be equally divided "between all my children that are now living," was held to give an interest to such children, as pur-

²⁹ *Herrick v. Franklin*, Law Rep. 6 Eq. 593. The learned judge here said: "The only difficulty was that raised by *Dunk v. Fenner*, 2 Russ. & My. 557; but I cannot assent to such a proposition of law, as that, where real and personal estate are blended, the personalty goes as the realty. Such a proposition is, I think, bad law, and authority is the other way. There is no authority for holding that, because the rule in *Shelley's case*, 1 Co. Rep. 219, applies to real estate, it is to be applied to personal estate also. *Forth v. Chapman*, 1 P. Wms. 664, decides that the same words, when applied to different subjects, may bear a different construction."

³⁰ 2 Kent, Comm. 426, 427.

³¹ 2 Kent, Comm. 428.

³² *Whitehead v. Lassiter*, 4 Jones, Eq. 79; *McCabe v. Spruil*, 1 Dev. Eq. 189.

chasers, whereby the children of one of the testator's children, which deceased before the father, might claim under the bequest, and that the distributees of a son, who died after the testator, but before the time of distribution (which was fixed by the will to take effect at the decease of the wife of the testator), were entitled to claim his share, and that the widow of such son was embraced in the class of distributees. These latter propositions are unquestionably sound, the estate having vested in the son at the death of the testator, but the former portion of the decision seems to go beyond the proper limits of construction, and to give a lapsed legacy to the next of kin, which cannot ordinarily be done except by the aid of a statute.³³ It seems in effect to be the vesting of an interest under the will, during the life of the testator.

21. In a recent case in Connecticut,³⁴ the court held that * a devise of all the testator's real estate to his widow during * 67 widowhood, with remainder to "my children and their heirs respectively; to be divided in equal shares between them;" the testator having, at the time of his decease, four children living, and four children deceased, all leaving children; and there being no reason apparent for his making any distinction between his children living and the issue of such as had deceased, carried an interest in fee to his living children and the representatives of such as had deceased, in equal shares.

22. In a modern case in Pennsylvania,³⁵ it was decided, that the terms "heirs" and "heirs of the body," being forms of expression which had long since acquired a definite legal signification, it could not be intended that, in a legal instrument like a will, they would be used in any but that definite sense. Hence, any one, who claimed that such terms had been so used, must assume the burden of showing it, upon some grounds admissible in aid of the construction; and in such case the court would feel justified in adopting the construction which would effect the intent of the

³³ Ante, § 3, pl. 11.

³⁴ Bond's Appeal, 31 Conn. 183. The court here repeat the common maxim, that it is competent for them to look into all the surrounding facts, in order to determine the import of the words of the will. Ante, § 2, pl. 24.

³⁵ Guthrie's Appeal, 37 Penn. St. 9. But in Kentucky, it has been held, that the words "heirs of the body" in wills are commonly to be construed as words of purchase, intended to give an independent interest to the children, and not as words of limitation defining the interest given. *Prescott v. Prescott*, 10 B. Mon. 56; *Jarvis v. Quigley*, 10 id. 104.

testator. The same is here said *arguendo*, in regard to other analogous terms, such as "children," "issue," &c. To justify a departure from the strict legal import, there must be an express warrant under the hand of the author of the gift. Conjecture, doubt, or even equilibrium of apparent intention, will not suffice.³⁵ Where the intention of the testator requires it, the word "heirs," and the words "heirs of the body," may be divested of their technical and usual meaning, as words of limitation, and converted into words of purchase.³⁶ The word "heirs" is flexible, and * 68 may * mean "next of kin" or "heirs at law," according to the nature of the property given.³⁷ The American cases will be found generally to confirm the same view.

23. It was held in a recent case,³⁸ in the Supreme Court of New York, where the rule in *Shelley's* case is abolished, in a devise of land to A. for life, and after his death, then to his heirs and assigns for ever, that the persons who, at the termination of the life-estate, are the heirs of A., took as purchasers, and not by

³⁵ *Chew's Appeal*, 37 Penn. St. 23. The word "heirs," as to personality generally, means all those who take under the statute of distribution, and commonly includes the widow. But where the context plainly shows that only the children are intended, the widow will be excluded. *Henderson v. Henderson*, 1 Jones, Law, 221; s. p. in *Evans v. Godbold*, 6 Rich. Eq. 26. The sense in which the term "heirs" is used in a will is always open to inquiry. *Bailey v. Patterson*, 3 Rich. Eq. 156. So of the word "children." *Stokes v. Tilly*, 1 Stockt. 130. "Heirs" construed children. *King v. Beck*, 15 Ohio, 559. See also *Doe v. Jackman*, 5 Ind. 283; *Kiser v. Kiser*, 2 Jones, Eq. 28; *Collier v. Collier*, 3 Ohio, n. s. 369. The terms "nephews and nieces" include those of the half-blood, but not grand-nephews and grand-nieces. *Shull v. Johnson*, 2 Jones, Eq. 202. The meaning of the word "heir" is in all cases a question of intention. *Williamson v. Williamson*, 18 B. Mon. 329. May mean children. *Blair v. Snodgrass*, 1 Sneed, 1. The words "heir," "issue," "children," construed as synonymous, to effectuate the intention of the testator. *Braden v. Cannon*, 1 Grant's Cases, 60. The terms "child or children" include a child en ventre sa mère, the same as one already born. *Barker v. Pearce*, 30 Penn. St. 173. And this rule applies as well to prevent the divesting of an estate as to the devisee. *Pearce v. Carrington*, L. R. 8 Ch. Ap. 969. In *Campbell v. Rawdon*, 18 N. Y. 412, it was decided that the rule construing the word "heirs," when used in a will with reference to a living person, as *designatio personarum*, is not applicable to a future estate, but that in regard to such an estate the word "heirs" will have its strictly legal force, and carry the inheritance, unless a different intention clearly appear.

³⁷ *Ingram v. Smith*, 1 Head, 411.

³⁸ *Moore v. Littel*, 3 Am. Law Reg. n. s. 144. See ante, n. 36, and cases cited.

descent ; and that the remainder so limited is contingent, and the heirs apparent have a future contingent estate, which under the New York statute will pass by a deed in fee. In Maine, the word "heirs" imports heirs apparent, children, or those entitled under the statute of distribution, and will not receive its technical common-law construction.³⁹ In a recent case in Maryland,⁴⁰ the testator devised to his son and four daughters, by name, all his real estate, during life, in equal shares ; and if either should die without issue, the share of such child to be equally divided among the testator's remaining children, for life ; and upon the death of any child, who shall leave any child or children, or the descendants of any such child or children, "the part of my lands which any child so dying shall be entitled to for his or her life shall belong to, and I do hereby devise the same unto, the child or children of my child so dying, or their descendants," in equal shares, "and to their heirs for ever, per stirpes and not per capita, and in case of the death of all my children without issue," then over in fee. All the children survived the testator. The son died without issue, leaving all the daughters. One daughter then died, leaving children. Then one of the daughters died without issue. It was held that her share, both the original portion and that which accrued by the death of her brother, descended exclusively to the surviving two daughters for life, and then either to their issue, or the survivor of them, as the case might be, in fee, and that the ultimate devise over failed, all the children not having died without issue.

24. It was held, at an early day,⁴¹ that where the testator devised his lands for sale, the proceeds to be disposed of as he should appoint, and in default thereof, to his four nephews, if he appointed a portion of the proceeds to other persons than the nephews, the remainder would go to the heir, and not to the nephews. But it seems questionable how far this case would be followed here, since it evidently proceeds upon strictly technical grounds rather than the intent of the testator, as indicated by the words of the will.

³⁹ *Morton v. Barrett*, 22 Me. 257; *Mace v. Cushman*, 45 id. 250.

⁴⁰ *Turner v. Withers*, 4 Am. Law Reg. N. S. 723.

⁴¹ *London v. Garway*, 2 Vernon, 571.

SECTION V.

BEQUESTS TO FAMILY, DESCENDANTS, NEXT OF KIN, RELATIONS, ETC.

1. The construction of the word "family" of comparatively little importance here.
2. Such bequests were in the early cases often held void for uncertainty.
3. The natural import of the term is, children.
4. In England it has been held to mean the heir of the family.
5. The parents are commonly excluded.
6. Family used in a more enlarged sense, as equivalent to descendants, or next of kin.
7. Bequests to descendants include all the direct descending line.
- 8, and n. 11. Lineal descendants sometimes held to include those descended from a common ancestor.
9. Descendants take per capita, unless required to take by way of representation.
10. The next of kin include the nearest blood relations, and those only.
11. The same subject further discussed in the House of Lords.
12. Degrees of kindred reckoned according to the civil law.
13. Husband and wife not regarded as of kin to each other.
14. But will take under bequest to those entitled by statute of distribution.
15. Construction of terms "next of kin on father's or mother's side," "next of kin in male line," "next of kin by way of heirship."
- * 70 16. Personal or legal representatives mean executors or administrators, primarily.
17. But in many cases it is evident these terms are used for next of kin.
18. These terms sometimes mean descendants.
19. They sometimes define a distinct class, who take under the will as purchasers.
- 20, and n. 37, 38. These words will be understood in their primary sense, unless the context shows another.
21. A bequest, in terms, to executors or administrators, may be construed in trust for others.
22. Executors and administrators the same as personal or legal representatives.
23. But these terms often used merely as words of limitation, to define the estate given.
24. And where the word "assigns" is added, they will always receive this construction.
25. The rule laid down in the latest English edition of Jarman.
26. Distinction between estates given direct, and after an intervening estate.
27. How far a gift to executors renders the estate part of that which he represents.
28. The question always arises, in such cases, whether the executor takes beneficially.
29. Such bequests may render the estate a portion of that represented.
30. Bequests to "relations" would fail for uncertainty, without some limitation. Rule established.
31. This rule often defeats the intention of the testator.
32. In *Pope v. Whitcombe*, representation admitted. General rule, all take per capita.

33. The terms "next" or "nearest" will not vary the construction.
34. The half-blood take concurrently with the whole blood, on a bequest to next of kin.
35. What words will include relations by affinity.
36. Bequests to the most deserving relations will not create an essential qualification.
37. Bequests to poor relations may create a charity. Mode of carrying into effect.
38. Bequests to testator's next of kin means next of kin, at his death, although distribution deferred.
39. The persons entitled to a bequest are to be ascertained as of the time the estate vests.
40. And if it be to such as are living at an after-period, it will not vary the construction.
41. It has been held that, if the tenant for life is the sole next of kin, he will not take as such.
42. Sir *John Leach's* exposition of this question. Sir *John Romilly's* rule as to the time of determining next of kin, &c.
43. But in *Pearce v. Vincent* it was held no inconsistency to make the same person tenant in tail, and in remainder.
44. The "next of kin" is sometimes referred to the tenant for life instead of the testator.
45. The same rule above stated, as to next of kin of the testator, applies to third persons.
46. The exceptions to the rule are so numerous, as to show its questionable character.
47. The word "then" used in fixing the period of the gift over creates an exception.
48. But the word "then" may be used merely to mark the order of events.
- * 49. Bequests to those of the name of the testator, *prima facie* mean his name, and not his family. * 71
50. One who has assumed another name by marriage cannot take.
51. But a new name, by legislative act or royal license, does not destroy the former name.
52. At what period the claimant must bear the required name.
53. Gift to servants means those in testator's employ at the date of the will.
- 54, and n. 122. The particular nature of service defined.
55. Legacy to poor inhabitants defined.
56. Construction of the term "relative" in the American courts.
57. The statute will determine the force of the words "heirs," &c.
58. Bequest to all the children, &c., embraces all living at date of will.
59. "Heirs or representatives" construed as personal representatives.

§ 5. 1. THERE has been considerable controversy in the English courts in regard to the proper construction of bequests to the family of the testator, or of others. The state of things is so different in England, as it regards families, from what it is here, that the ordinary import of the word can scarcely be regarded the same. And the fact that so many cases, where the meaning of this term came in question, have arisen in the English courts upon the construction of wills, and comparatively so few in this country, leads

us to the conjecture, that the word "family" will but seldom occur, in a will, in this country, where there will not be something, either in other portions of the will, or in the surrounding circumstances, which may lead to a reasonable ground of inferring, with probable certainty, the sense in which it was used by the testator.

2. In the English courts, bequests to the family of one have often been held void for uncertainty.¹ But that course is not so common, in regard to bequests of any kind, as formerly. And now it is said, in an English work to which we have had constant occasion to refer, that "it should seem that a gift to the family, either of the testator himself, or of any other person, will not be held to be void for uncertainty, unless there is something special creating that uncertainty."² "The subject-matter and the context of the will are to be taken into the account," and the bequest upheld if it can be fairly made out what the testator intended by the word "family."

3. It has often been held, that a bequest to one and his * 72 family, * he having children at that time, was intended for such person and his children; and that such children, as were living at the decease of the testator, were entitled to take.³ Lord *Cranworth* here says that this is the import of the word "family" in "common parlance." And it has been held, that a bequest to one's wife, "towards the support of her family," gave the children such an interest in the estate devised, as to enable them to maintain a bill in their own names to protect such interest.⁴

4. There are several English cases where bequests to a family, or house, have been held presumptively intended for the heir of such house or family.⁵ This result is attributable mainly to the

¹ *Harland v. Trigg*, 1 Br. C. C. 142; *Doe d. v. Joinville*, 3 East, 172; *Robinson v. Waddelow*, 8 Sim. 134. This latter case has been questioned in *Parkinson's Trust*, 1 Sim. N. S. 242, 246, per Lord *Cranworth*, V. C., who said, "I cannot say that that case is quite satisfactory to my mind."

² *Jarman* (ed. 1861), 87.

³ *Parkinson's Trust*, 1 Sim. N. S. 242; *Barnes v. Patch*, 8 Vesey, 604; *Wood v. Wood*, 3 Hare, 65.

⁴ *Woods v. Woods*, 1 My. & Cr. 401. See also *Beales v. Crisford*, 13 Sim. 592.

⁵ *Counden v. Clerke*, Hob. 29; *Chapman's case*, Dyer, 333 b; *Wright v. Atkyns*, 17 Vesey, 255; *Doe d. v. Smith*, 5 M. & Sel. 126; *Griffiths v. Evan*, 5 Beav. 241.

law of primogeniture, which has so long prevailed in England, and whereby a policy of the law has grown up in favor of keeping estates, especially of a landed interest, in the family of the eldest male heir.

5. Questions have often been raised, how far a bequest to one's family should be construed to include the parents as well as the children of the family. It has been more commonly held that the parents are to be excluded in such bequests.⁶

6. There are many cases where the word "family" is used in wills in a more general and unlimited sense, as synonymous with "descendants," so as to include children and grandchildren, and even those more remote. But this extended import of the word will generally be sufficiently indicated by the context and the surrounding circumstances, as where the testator bequeathed personal property to his wife, and by a codicil, which was in the form of a letter to his wife, he said, "I should be unhappy if I thought it possible that any one not of your *family* should be the better" for what he left her; and it was held that the word "family" was not confined to children, but included descendants in every degree.⁷ And when used in a general and enlarged sense it has sometimes received the construction of "next of kin,"⁸ as where the * 73 testator gave a sum of money in trust for his wife for her life, and at her demise "let the principal return to the good of my family, whoever survives me longest." But it is evident, as said by an experienced writer upon this subject,⁹ every case must depend upon its peculiar circumstances.

7. The word "descendants" is a term which does not seem susceptible of much variation by way of construction, unless where the attending circumstances, or other portions of the will, indicate some limitation upon the sense in which it is used. In its general sense it must include all in the direct descending line from the person named as the ancestor.¹⁰

⁶ Barnes v. Patch, 8 Vesey, 604; MacLeroth v. Bacon, 5 Vesey, 159; Blackwell v. Bull, 1 Keen, 176. See also James v. Lord Wynford, 2 Sm. & Gif. 350.

⁷ Williams v. Williams, 1 Sim. n. s. 358.

⁸ In re Maxton, 4 Jur. n. s. 407. In this case the testator left no children; and Wood, Vice-Chancellor, held that it was a remainder vesting in the next of kin of the testator, at the time of his decease, as joint-tenants.

⁹ 2 Jarman (ed. 1861), 87.

¹⁰ Crossly v. Clare, Amb. 397. In this case the bequest was "to the

8. There is one somewhat remarkable case,¹¹ where the testator gave all the residue of his real and personal estate unto and amongst all his relations who might claim and prove their relationship to him by *lineal descent*. He had no wife or issue * 74 at the * time of making the will, nor afterwards. His nearest relations by blood when his will was made were his first cousins, of whom there were six or more, and these persons continued to be the next of kin to the testator at the time of his death. It was held, that these persons were entitled, under the will, to receive the residue. The Vice-Chancellor, *Knight Bruce*, held the words "lineal descent" to be mere surplusage, and to have been used by the testator, either ignorantly or not advisedly. But it is here further urged that "lineal descent" may with some propriety be applied to collateral relations who of necessity trace their descent from some common ancestor. Rather to avoid the result of declaring the bequest wholly inoperative on the ground of uncertainty, than from any confident conviction how the testator did understand the words "lineal descent," the court held all the first cousins of the testator, by blood, entitled under the will.

9. It seems that in a bequest to descendants *equally*, or to all the descendants of any person, or to the descendants, simply, that

descendants of F. J., now living in and about Sevenoaks, or hereafter living anywhere else;" and it was held that a grandchild, born after the will, was not entitled. See also *Legard v. Haworth*, 1 East, 120.

¹¹ *Craik v. Lamb*, 1 Coll. 489. It seems to be conceded that the early writers upon the law of descent did not use the terms "lineal descent," and "lineally descended," in that precise and definite sense which is now attached to them, in the English law, as being confined to those in the direct descending line from the testator, or other person named. These terms, in this narrower and strict sense, seem first to have been used by *Littleton*, see § 3. But the earlier writers applied these terms to collateral, as well as direct descent. *Glanv.* lib. 7, c. 4; *Bracton*, lib. 2, c. 31; *Britton*, cap. 119; *Fleta*, lib. 6, cap. 2, p. 372. There are other cases where somewhat similar questions have been discussed. See *Boys v. Bradley*, 4 DeG., M. & G. 58. But it seems now to be very well settled, notwithstanding some exceptional cases, that, as a general rule, the term "descendants" cannot be held to include any collateral relation. *Hamlin v. Osgood*, 1 Redf. Sur. Rep. 409. It is here said, the term does not mean next of kin, or heirs at law generally, but the issue of the body of the person named, in every degree, as children, grandchildren, great-grandchildren, &c. And in *Baker v. Baker*, 8 Gray, 101, it was held that "descendants" in a will cannot be construed to include any but lineal heirs, without clear indication in the will of an intention to extend the meaning of the term.

all take per capita.¹² But where there is a provision in the will, that they shall take by way of representation, this implies, that they shall take per stirpes and not per capita.¹³ This point is fully discussed under the title "issue."¹⁴

* 10. Bequests to the next of kin of the testator, or of * 75 some person named, have received somewhat different constructions in the early cases, and different views have been maintained by different judges of great learning and ability. On the one hand, the terms were held to include those only who would take under the statute of distributions. Of this opinion were Mr. Justice *Buller*,¹⁵ Lord *Kenyon*,¹⁶ and Sir *John Leach*.¹⁷ And on the other hand were Lord *Thurlow*,¹⁸ Lord *Eldon*,¹⁹ Sir *William Grant*,²⁰ and the decision of Sir *T. Plumer*, in *Brandon v. Brandon*,²¹ who all maintain that the terms "next of kin" apply to

¹² *Butler v. Stratton*, 3 Br. C. C. 367; *s. p.* *Farmer v. Kimball*, 46 N. H. 435; 1 *Barnaby v. Tassell*, L. R. 11 Eq. 363.

¹³ *Rowland v. Gorsuch*, 2 Cox, 187. It has sometimes been held by the American courts, that, in case of bequests to "descendants," the question whether they take per capita or per stirpes is one of intention, to be judged of by the general scope of the will, in connection with its specific provisions; and that the bequest to "descendants" of the share of their "deceased parent," or ancestor, in connection with other portions of the will, tending to show that the testator looked to the principle of representation, might be construed as restricting the import of the term "descendants" to children and the descendants of children, and that they might therefore take per stirpes and not per capita. *Barstow v. Goodwin*, 2 Bradf. Sur. Rep. 413. But a bequest to the descendants of the brothers and sisters of A. living at the testator's death, "such descendants to take per stirpes and not per capita," was held to be divisible into as many shares as there were brothers and sisters of A. living at the testator's death, or the descendants of any deceased brother or sister; and these shares were again divisible into as many parts as there were children of any deceased brother or sister, and so on; but that no descendant should share concurrently and in equal proportion with a living ancestor. *Gibson v. Fisher*, Law Rep. 5 Eq. 51; *s. c.* 16 W. R. 115. But illegitimate children of the same father, even though recognized by him as children, are not next of kin to each other, except by force of some special statutory provision. *Standley's Estate*, Law Rep. 5 Eq. 303.

¹⁴ Ante, § 3.

¹⁵ *Phillips v. Garth*, 3 Br. C. C. 64.

¹⁶ *Stamp v. Cooke*, 1 Cox, 234.

¹⁷ *Hinckley v. Maclarens*, 1 My. & K. 27.

¹⁸ *Phillips v. Garth*, supra.

¹⁹ *Garrick v. Lord Camden*, 14 Vesey, 372.

²⁰ *Smith v. Campbell*; *Cooper*, 275.

²¹ 3 Swanst. 312.

those nearest in kindred to the propositus, and exclude all of more remote degree. The question came before the court in *Elmsley v. Young*,²² and at the Rolls it was held, that the words "next of kin" used simpliciter, and without explanatory context, must be taken to mean next of kin according to the statute of distributions. But upon appeal before the Lords Commissioners, the judgment upon this point was reversed, and the cases very extensively reviewed by their lordships.²³ It was here held, that the words "next of kin" must be construed to mean, when used simpliciter, nearest of kin, and so a brother of the propositus will take the whole bequest to the exclusion of the children of a deceased brother or sister.

11. This subject was discussed at length before the House of Lords, in *Withy v. Mangles*,²⁴ and the conclusion reached, * 76 that * *Elmsley v. Young* must be regarded as the settled law in regard to this point, and that the father and mother were equally to be regarded as next of kin, and took concurrently. Lord *Cottenham* said the term "next of kin," under the statute of distributions, "had been inaccurately used, since the statute carefully avoided using any such form of expression, without qualification, allowing the representation of those who had deceased of the nearest kindred, unless more remote than brothers' and sisters' children." His lordship maintained that the term "next of kin" had acquired no such popular import as to include those who would take under the statute of distributions in case of intestacy. Lord *Campbell*, with more hesitation and doubt, concurred in the same result, which must now be regarded as the settled rule of the Eng-

²² 2 My. & K. 82.

²³ *Elmsley v. Young*, 2 My. & K. 780. The cases of *Phillips v. Garth*, 3 Br. C. C. 64, *Hinckley v. Maclarens*, 1 My. & K. 27, and the case of *Elmsley v. Young*, supra, as decided before the Master of the Rolls, were here distinctly overruled.

²⁴ 10 Cl. & Fin. 215. And in *Halton v. Foster*, Law Rep. 3 Ch. Ap. 505, the same rule was adopted, where the bequest was to the "next of kin in blood." But "personal representatives were construed statutory next of kin." *Grylls' Trusts*, Law Rep. 6 Eq. 589. Bequest to "next of kin, according to the statute of distributions," was held to go to all entitled, as tenants in common. *Ranking's Settlement Trusts*, Law Rep. 6 Eq. 601. Bequest to "heirs" construed next of kin. *Philps' Will*, Law Rep. 7 Eq. 151; ante, § 4, n. 25.

lish law. It seems that, in general, the next of kin are to be ascertained, as of the death of the *propositus*.²⁵

12. In *Withy v. Mangles*,²⁶ Lord *Langdale*, M. R., after deciding that the parents and children are in equal nearness of kin, * said : " All writers upon the law of England appear to con- * 77 cur in stating, that in the ascending and descending line, the parents and the children are in equal degree of kindred to the proposed person ; and I think, that, except for the purposes of administration and distribution in cases of intestacy, and except in cases where the simple expression may be controlled by the context, the law of England does consider them to be in equal degree of consanguinity." The mode of computing the degrees of kindred is controlled by the rule of the civil law.²⁷ If the person, whose

²⁵ *Gundry v. Pinniger*, 1 DeG., M. & G. 502.

²⁶ 4 Beav. 358. The terms next of kin cannot be made to embrace relations by affinity. *Nichols v. Savage*, 18 Vesey, 52. Next of kin of two persons means next of kin of both. *Pycroft v. Gregory*, 4 Russ. 526. As to proper construction of the words " next of kin," see also *Richardson v. Richardson*, 9 Jur. 322; 4 Sim. 526; *Wimbles v. Pitcher*, 12 Vesey, 433; *Baines v. Ottey*, 1 My. & K. 465. Representatives construed next of kin. *Jennings v. Galimore*, 3 Vesey, 146.

Where executors have a discretion to distribute among a class, they must give each member some, but the amount rests wholly in their discretion. *Bennett v. Honeywood*, Amb. 708. And under a bequest of personalty to one for life, to distribute at her decease to such of the testator's family or relations as she shall see fit, the donee may select the objects of her bounty among the testator's relations or family, though not within the degree of next of kin. But if the power of selection fails to be exercised, the law will devolve the estate upon the next of kin. *Grant v. Lynam*, 4 Russ. 292. And where a limitation was made to a marriage settlement for the benefit of the wife, of the wife's chattels, to executors or administrators of her own family, and in precisely the same words, of the husband's chattels, the court held, upon the basis of the obvious intent, that as to the wife it meant her next of kin, at her decease, and as to the husband, his executors or administrators simply. *Smith v. Dudley*, 9 Sim. 125. The words " brother and sisters " construed to designate specific persons, and not a class. *Alexander v. Walch*, 3 Head, 493. Where the terms of the will provide for keeping the family together, and supporting them till of age, special expenses incurred for one of the children cannot be charged against her distributive share. *Clopton v. Jones*, 38 Ala. 121. Surplus income belongs to those entitled thereto under the will, and not to those to whom the corpus is given. *Browne v. Paull*, 1 Sim. n. s. 92.

²⁷ *Cooper v. Denison*, 13 Sim. 290. It is here held that " next of kin " means next of blood, or nearest kindred by consanguinity. Grandchildren and brothers of the proposed person are in equal degrees of kindred. *Avison v.*

next of kin is to be ascertained, have one brother living, and children of other deceased brothers, the surviving brother alone is next of kin.²⁸

13. A bequest by husband or wife to next of kin does not include the wife or husband, as the case may be. And the same rule applies to a bequest under a power, and where the will provides that the next of kin shall take, as in case of intestacy.²⁹ And it seems clear that where the bequest in terms refers to the statute of distributions, or to a case of intestacy, in defining "next of kin," the term will receive the same construction as in the statute, and representation be allowed to the same extent.³⁰

14. It has been held that under a bequest "to the person
* 78 or * persons who would, under the statute of distribution of intestate's effects, have been entitled to my personal estate in case I had not disposed of the same by will," the wife of the testator may be included, if there is no other ground of exclusion; and that the description of legatees, being one of interest and not of persons, the shares will not necessarily be equal, but according to the statute.³¹ And the persons entitled under such a clause must be ascertained at the death of the testator, and consequently the widow will be entitled, or her personal representatives, notwith-

Simpson, 1 Johns. (Eng. Ch.) 43. A bequest to children or their descendants creates an absolute estate in the children. *Jones v. Torin*, 6 Sim. 255. So, also, to the daughters of A. and their descendants per stirpes. *Dick v. Lacy*, 8 Beav. 214. So of a bequest to the heirs, devisees, and legal representatives of one as purchasers, the property will pass by the will of such person embracing it. *Drake v. Pell*, 3 Edw. Ch. 251.

²⁸ In re Webber's Settlement, 17 Sim. 221. The Vice-Chancellor here held, that "the rule in construing a deed was that the first words were the controlling ones," and that if subsequent portions of the deed were wholly irreconcilable with former portions of the instrument, the latter portions must be disregarded. Such a rule of construction is too arbitrary to stand.

²⁹ *Garrick v. Lord Camden*, 14 Vesey, 372. The decisions upon this point are too numerous to be repeated. *Watt v. Watt*, 3 Vesey, 244, and note to Sumner's ed.; 2 Kent, Comm. 136. Bequest to the testator's nearest relations and connections held not to include his widow. *Storer v. Wheatley*, 1 Penn. St. 506; *Worseley v. Johnson*, 3 Atk. 758. But see *Johnson v. Johnstone*, 13 Rich. 259, contra. See also *MacLeroth v. Bacon*, 5 Vesey, 159; *Cholmondeley v. Lord Ashburton*, 6 Beav. 86.

³⁰ *Garrick v. Lord Camden*, 14 Vesey, 372, 385; *Withy v. Mangles*, 4 Beav. 358, 368; *Nichols v. Haviland*, 1 K. & J. 504, 507.

³¹ *Martin v. Glover*, 1 Coll. C. C. 269. Ante, n. 29.

standing she may have had, under the will, a life-interest, which will delay the distribution until after her death.³²

15. Bequests to next of kin on the father's side, or on the mother's side, may go to the person who is next of kin upon both sides, unless one side of the kindred is excluded, and in that case it will go to the person next of kin after him who sustained that relation upon both sides.³³ And on a bequest to the "nearest of kin in the male line in preference to the female line," it was held that this meant "next of kin *ex parte paterna*," and that the legatee need not be a male, nor claim wholly through males.³⁴ The expression, "next of kin by way of heirship," in regard to real estate, was construed to mean the heir, although not the next of kin.³⁵

16. Legal representatives and personal representatives, in the strict, and perhaps in the popular or professional sense, mean nothing more nor less than executors or administrators. But from the fact that bequests have often been left to "legal representatives," and sometimes to "personal representatives," and that it could not reasonably be presumed that it was the purpose of the testator to make such gifts beneficially to the executors or administrators, whose relation is rather official and fiduciary than personal * to the testator, courts have sought to give effect to * 79 the intention by means of some secondary sense of the terms.

But each case under this head must be decided upon its own circumstances. (a)

17. Thus, where the testatrix gave the residue of her estate to certain persons, and, if these should die in her lifetime, then to their legal representatives, it was held that the next of kin were

³² *Jenkins v. Gower*, 2 Coll. C. C. 537. See also *Starr v. Newberry*, 23 Beav. 436; *Lewis v. Morris*, 19 Beav. 34.

³³ *Gundry v. Pinniger*, 14 Beav. 94; *Say v. Creed*, 5 Hare, 580. It seems here that the next of kin, in case of a bequest to them, are to be ascertained as of the time when the estate takes effect.

³⁴ *Boys v. Bradley*, 10 Hare, 389; s. c. 4 DeG., M. & G. 58, &c.; s. c. nom. *Sayer v. Bradley*, 5 Ho. Lds. Cas. 873.

³⁵ *Williams v. Ashton*, 1 Johns. & H. 115. And "next of kin in equal degree" will give the estate to a surviving sister, to the exclusion of the children of a deceased brother. *Anonymous*, 1 Madd. 36.

(a) *Best's Settlement Trusts*, 22 W. R. 599; L. R. 18 Eq. 686; *Robinson v. Evans*, 22 W. R. 199.

entitled under this designation.³⁶ And it has been held that legal representatives mean next of kin, according to the statute of distributions.³⁷

³⁶ *Bridge v. Abbot*, 3 Br. C. C. 224; *Mallinson v. Siddle*, 18 W. R. 569.

³⁷ *Smith v. Palmer*, 7 Hare, 225. See also *King v. Cleaveland*, 26 Beav. 26; s. c. 4 DeG. & J. 477; *Holloway v. Radcliffe*, 23 Beav. 163. The discussion of the question, when personal representatives take by way of substitution for those whom they represent, and when they take as purchasers under the will, is left in a very obscure state in many of the opinions of the ablest equity judges in the English courts. In *King v. Cleaveland*, 26 Beav. 26, the subject is somewhat extensively reviewed by the Master of the Rolls, Sir *John Romilly*, and the cases bearing upon the point noticed. The distinction which is here pointed out is that where descendants or personal representatives are appointed to take by way of substitution of the members of a class, they cannot take in the place of one who was not himself a member of the class, and that consequently such of the first class as were dead before the time the estate was to vest, and who were consequently never entitled themselves, could not be represented by issue, or other representatives, in such a manner as to make their shares available. *Gray v. Garman*, 2 Hare, 268. But this rule will not apply where the first gift is to named individuals, because there it is expressly intended the substitution shall take place, in order to prevent a lapse. *Coulthurst v. Carter*, 15 Beav. 421; *Ive v. King*, 16 Beav. 46. See also *Hobgen v. Neale*, L. R. 11 Eq. 48. So also it has been held where those who are provided to take, in lieu of those to whom the bequest is first given, are referred to as a distinct class, they will take, notwithstanding those into whose places they came were never in a condition to have taken, no interest having ever vested in them. *King v. Cleaveland*, *supra*. This point has been a good deal discussed in the English courts, and the decisions do not seem altogether consistent with each other.

In *Thornhill v. Thornhill*, 4 Madd. 377, upon a devise of land to testator's wife for life, with a direction that after her death the products of the sale of the premises should be divided among the testator's nephews and nieces, the children of such of them as should then be dead to stand in the place of their father and mother deceased, and where a nephew and niece died in the testator's lifetime leaving children, it was held that the benefit of the bequest extended only to such of the testator's nephews and nieces as were in esse at the testator's death, and to the children of such of them as should die after the testator and before his wife. This case was examined and overruled in *Collins v. Johnson*, 8 Sim. 356, in note; *Smith v. Smith*, 8 Sim. 353, where it was held, under a similar gift over, and one of the children living at the date of the will died before the testator, that the issue of such child was entitled to a share of the bequest. Upon this last case, the Master of the Rolls, in *King v. Cleaveland*, *supra*, makes the following comment: "It is obvious that the child of a son who had died did not take by substitution, as has been sometimes erroneously supposed, but as the object of a separate and distinct

* 18. In case of a bequest to the children of A. after the termination of a life-estate, but if any of the children of A. should die in A.'s lifetime, then to the personal representative of such child or children, to take per stirpes and not per capita, and where in another portion of the will there was a gift, "in case there should be no such children, nor any representatives of such children, living at A.'s death, then to the persons who should be the testator's next of kin," it was held that personal representatives meant descendants.⁸⁸

19. And in *King v. Cleaveland*,⁸⁹ it was held, that a gift to one for life, and after his decease to his children "then living, or their personal representatives, share and share alike," that the representatives took as a distinct class and not by substitution, and that the representatives of children, who died in the lifetime of the testator, and of those who were dead at the date of the will, participated. The Master of the Rolls thus expressed his view of the

class. There were two classes, — one was the class of children who survived the wife, and the other was the issue of such children as should happen to die in the lifetime of the wife; and the Vice-Chancellor held, that there was nothing to limit the gift to the issue of those children who happened to die in that portion of his wife's life which elapsed after the death of the testator and the division of the fund." The rule laid down in the text is maintained in the late case of *Re Gryll's Trusts*, L. R. 6 Eq. 589. And a bequest to the son of the testator or his executor, the son dying before the testator, was held to go to the administrator of such son by way of substitution, to be held in trust for those legally entitled. *Maxwell v. Maxwell*, Ir. L. R. 2 Eq. 478.

⁸⁸ *Atherton v. Crowther*, 19 Beav. 448. In this case, Sir John Romilly, M. R., said: "Personal representatives, *prima facie*, mean executors or administrators; and in my opinion the burden of proof lies upon the person who contends the contrary, to show, *from the context of the will*, that the testator has not used those words in their primary and original signification." It will often occur that in the same will both the terms "legal representatives" and "executors and administrators" will occur, in such a way as to show that they are used by the testator in senses widely different. *Walter v. Makin*, 6 Sim. 148; *Robinson v. Smith*, *id.* 47. See also *Nicholson v. Wilson*, 14 Sim. 549; *Walker v. Marquis of Camden*, 16 Sim. 329; *Booth v. Vicars*, 1 Coll. C. C. 6; *Saberton v. Skeels*, 1 Russ. & My. 587; *Hinchliffe v. Westwood*, 2 DeG. & S. 216; *Philps v. Evans*, 4 DeG. & S. 188; *Baker v. Gibson*, 12 Beav. 101; *Styth v. Monro*, 6 Sim. 49. The word "next" being prefixed to "legal representatives," was held decisive that executors or administrators were not intended. *Booth v. Vicars*, 1 Coll. C. C. 6.

⁸⁹ 26 Beav. 26. See ante, n. 37; and also *Burt v. Hellyar*, L. R. 14 Eq. 160.

case: "That there are two distinct classes, — first, the
 * 81 * nephews and nieces who were then living; and secondly,
 the representatives of such of the nephews and nieces who
 shall have died who are to take 'share and share alike.' I hold
 that these words, 'legal and personal representatives,' include the
 representatives of all the nephews and nieces, not only those living
 at the date of the will, but those who had died previous to that
 period; and this is in accordance with *Coulthurst v. Carter*." ⁴⁰

20. In *Dixon v. Dixon*,⁴¹ a testator, after the death of his daughter, gave real and personal estate to her legal personal representatives, to hold to them, their heirs, executors, &c., according to the nature of the property; she left a husband, who took out administration, and an only child, and it was held that the husband took both the real and personal estate.

21. The disposition of the English courts of equity in favor of carrying bequests, given in the name of personal representatives, to such of the testator's family as he probably intended to benefit, has been so decidedly manifested in many of the more recent decisions, that it has even been held, that where a bequest is given, in terms, to the "executors or administrators," that it must be supposed that the testator only intended to have them take in trust for some other party, who was really intended to become the recipient of his bounty. Thus, in *Palin v. Hills*,⁴² the testator gave a legacy of £2,000 to S. B.; and, in case S. B. should die in the lifetime of the testator, he directed that the legacy should be paid to the executors or administrators of S. B. The legatee died in the lifetime of the testator, having made a will by which she appointed a residuary legatee; and the Master of the Rolls, Sir *John Leach*, held, that as the executors, &c., as well as the next of kin, were, at the date of the will, persons not ascertained, it could not be assumed that the testator would naturally wish to bestow his bounty upon either; and as it was clear that the legatee named was primarily designed as the object of the gift, it would be more in accordance with the testatrix's probable wish that it should go, beneficially, to her residuary legatee; and decreed accordingly.

22. But upon appeal before the Lord Chancellor, Lord *Brougham*, his lordship determined, after a review of the cases, that the case

⁴⁰ 15 Beav. 421.⁴¹ 24 Beav. 129.⁴² 1 My. & K. 470

was in all respects the same in principle as those where * the personal or legal representatives were named, instead * 82 of the executors or administrators, as in the present case, and decreed the legacy to be paid to the next of kin of the first legatee named.⁴³

23. In *Taylor v. Beverley*,⁴⁴ it was held, that a bequest to "my surviving children and their legal personal representatives, share and share alike," must be construed in the primary sense of the words, as the ordinary mode of giving an absolute estate to the "surviving children," and that no estate passed under the bequest to any kindred or representatives in blood of such children.

24. It would seem that where the word "assigns" is superadded to "executors or administrators," they will always be construed as words of limitation, merely indicating that the whole interest of the testator was intended to pass, and not as words of purchase, whereby any estate was intended to be secured to any other person

⁴³ His lordship here said : "Indeed, I cannot regard this as at all an open question. *Bridge v. Abbot*, 3 Br. C. C. 224, has decided it." It is here said that *Evans v. Charles*, 1 Anstruther, 128, was decided "upon very special circumstances," and the court "expressly declared, that it did not intend to dispute the authority of *Bridge v. Abbot*." In *Long v. Blackall*, 3 Vesey, 486, both the cases last named were brought under review, and held to have been rightly decided. So also again was the same conclusion reached, in *Holloway v. Holloway*, 5 Vesey, 399. And it was here held, that neither the case of *Ripley v. Waterworth*, 7 Vesey, 425, nor that of *Price v. Strange*, Madd. & Geld. 159, were in conflict with *Bridge v. Abbot*. His lordship, in *Palin v. Hills*, supra, thus concludes : "I entertain no doubt respecting this question. I cannot, for the first time, overrule such an authority as that of *Bridge v. Abbot*, without any one case, and with scarcely one dictum the other way, — an authority worthy of all acceptance, on all accounts, for the learning, the peculiar care and assiduity which distinguished the excellent, most painstaking, and most candid judge who decided it, — an authority never yet noticed but to be approved, when it has been brought under the deliberate consideration of the court." This seems to be well established. Thus, in *Bulmer v. Jay*, 3 My. & K. 197, it was held, that a direction to pay money to the executors or administrators of the wife, upon the whole scope and context of the instrument, created a trust for the next of kin of the wife, although she died in the lifetime of the husband, whereby the right of administration would devolve upon him. But where a sum of money, after the decease of the wife, was appointed for the use of her executors and administrators, "for their own use and benefit absolutely," it was held that she had no control over it, but that it belonged to the husband in right of administration of her effects. *Wallis v. Taylor*, 8 Sim. 241.

⁴⁴ 1 Coll. C. C. 108.

or persons.⁴⁵ And where money was settled, in trust for the
 * 83 wife * for life, with remainder to her children, with remainder as she should appoint, and in default thereof to her “executors, administrators, and assigns,” and the husband survived the wife, and she made no appointment, and there were no children, it was held, after the death of the husband and wife, that the next of kin of the wife, and not the representatives of the husband, were entitled to the fund.⁴⁶

25. The conclusion announced in the latest English edition of Mr. Jarman’s excellent treatise upon Wills is that the doctrine “to be drawn from the more modern, not unsupported by some of the earlier cases, is, that not only the words ‘executors or administrators,’ but also the words ‘representatives,’ ‘legal representatives,’ and ‘personal representatives,’ must, *prima facie*, be taken to mean the persons constituted representatives by the Ecclesiastical Court. This is the ordinary and legal meaning of the terms, and it lies on those alleging the propriety of a different interpretation to show that the testator’s intention is clearly so, — to show more than a doubt; since raising only a doubt, they leave his expression in possession of its proper force.”⁴⁷ And we would add, that this intention of the testator must be shown by the context of the will, or by the surrounding circumstances, admissible in aid of the construction.⁴⁸ The term “legal representative” has sometimes been regarded as less precise in its legal import than the other analogous expressions above alluded to.⁴⁹ But it is questionable how far any such distinction can be made available, as a general rule of construction.⁵⁰ But in *Price v. Strange*,⁵¹ Sir *John Leach*, Vice-Chancellor, held that “legal representatives” must be understood

⁴⁵ Co. Litt. 54 b; *Socket v. Wray*, 4 Br. C. C. 483.

⁴⁶ *Graffey v. Humpage*, 1 Beav. 46. See also *Hames v. Hames*, 2 Keen, 646; *Howell v. Gayler*, 5 Beav. 157; *Spence v. Handford*, 4 Jur. n. s. 987. The same rule laid down in the text is adhered to by Vice-Chancellor *Wigram* in *Holloway v. Clarkson*, 2 Hare, 521. See also *Page v. Soper*, 11 Hare, 321; *Saberton v. Skeels*, 1 Russ. & My. 587; *Cotton v. Cotton*, 2 Beav. 67.

⁴⁷ 2 Jarman (ed. 1861), 102.

⁴⁸ Ante, note 38.

⁴⁹ See *Topping v. Howard*, 4 DeG. & Sm. 268; *Smith v. Barneby*, 2 Coll. C. C. 728, 736.

⁵⁰ See *Holloway v. Clarkson*, 2 Hare, 521, 524; *In re Crawford’s Trusts*, 2 Drew. 230, 235; *King v. Cleaveland*, 4 DeG. & J. 477, 484.

⁵¹ *Madd. & Geld*. 159. The learned judge here relied chiefly upon the principle of the case of *Bridge v. Abbot*, 3 Br. C. C. 224.

as “executors or administrators,” unless controlled by intention upon the whole * instrument. And the same words * 84 received the same construction in *Saberton v. Skeels*.⁵² The more recent cases seem pretty generally to require that to change any of these terms from their primary import the evidence of the testator’s intention ought to be very strong.⁵³

26. The cases have adverted to a distinction which seems to be founded in reason, between bequests to take effect immediately upon the death of the testator, and those which were only to come into operation after the expiration of an intervening life-estate. In the former case the terms “executors, personal representatives,” and other analogous terms, are more naturally construed as words of limitation, and in the latter case it is more reasonable to conclude that the testator intended to provide for the final disposition of the estate, in case of the death of the legatee during the intervening estate. This distinction is dwelt upon in *Crawford in re*.⁵⁴

27. It was held in one case,⁵⁵ that where a legacy was bequeathed to A., and in case he should die in the testator’s lifetime, to the legatee’s personal representatives, that neither the executor nor the next of kin were entitled, but that it belonged to the person entitled to the intended legatee’s residuary estate. But in the case of *Long v. Watkinson*,⁵⁶ Sir *John Romilly*, M. R., after adverting to the difficulty in reconciling the case of *Palin v. Hills*⁵⁷ with some more recent cases,⁵⁸ held that where the testator bequeathed the residue of his estate to A., and in case of her death “to the executors or executrixes whom A. by her will may appoint,” and A. having died in the lifetime of the testator, that neither the residuary legatee nor the next of kin of A. took the residue as personæ designatæ, but that it went to the executrix.

28. The question generally arises, as we have already intimated, in all these cases where an estate is given by will, in certain events,

⁵² 1 Russ. & My. 587. See also *Reynell v. Reynell*, 10 Beav. 21.

⁵³ *Attorney-General v. Malkin*, 2 Phill. C. C. 64; *Allen v. Thorp*, 7 Beav. 72.

⁵⁴ 2 Drew. 230, 235, 242.

⁵⁵ *Hewitson v. Todhunter*, 22 L. J. Ch. n. s. 76.

⁵⁶ 17 Beav. 471.

⁵⁷ 1 My. & K. 470.

⁵⁸ *Daniel v. Dudley*, 1 Phill. C. C. 1; *Allen v. Thorp*, 7 Beav. 72; *Attorney-General v. Malkin*, 2 Phil. C. C. 64; *Holloway v. Clarkson*, 2 Hare, 521.

to "executors," "personal representatives," &c. (and there is nothing in the will or in the attending circumstances proper to be received in aid of the construction, to show that any other * 85 persons * were intended by these terms), whether the executors, &c., take beneficially (for themselves), or for the estate which they represent.⁵⁹ But after some dissent,⁶⁰ it seems now finally settled, both by the decisions of the English courts, and finally by statute,⁶¹ that unless a contrary intention appear by the context, whatever is bequeathed to the executors or administrators vests in them, as part of the personal estate of the testator or intestate.⁶²

29. And it seems that bequests to the executors, &c., of any person, will make the estate a portion of the estate of such person in the fullest sense, so that it will be subject to the disposition of the will of such person, notwithstanding he may die before the testator.⁶³

30. Bequests to "relations," without any limitation or definition, if construed in the literal and extended sense, would include such an indefinite multitude, that every such attempt to dispose of property must wholly fail, by reason of uncertainty. To avoid this result, the English courts have restrained these terms to such persons only as come within the statute of distributions, and would take the estate in case of intestacy.⁶⁴ And the same rule extends

⁵⁹ 2 Jarman, 105.

⁶⁰ *Evans v. Charles*, 1 Anstruther, 128; *Churchill v. Dibben*, Sug. Pow. (8th Lond. ed.) 312; *Long v. Blackall*, 3 Vesey, 486. ⁶¹ 1 Wm. IV. ch. 40.

⁶² *Stocks v. Dodsley*, 1 Keen, 325. The bequest here was "to the executors or administrators of G. W. *absolutely*," but the court held that the executor did not take a beneficial interest in the legacy. *Morris v. Howes*, 4 Hare, 599; *Collier v. Squire*, 3 Russ. 467; *Andrew v. Andrew*, 1 Coll. C. C. 686.

⁶³ *Long v. Watkinson*, 17 Beav. 471; *Smith v. Barneby*, 2 Coll. C. C. 728. See also *Mackenzie v. Mackenzie*, 3 Mac. & Gord. 559; *Morris v. Howes*, 4 Hare, 599; *Wallis v. Taylor*, 8 Sim. 241.

⁶⁴ *Spring d. v. Biles*, 1 T. R. 435 n., 437 n.; *Green v. Howard*, 1 Br. C. C. 31; *Rayner v. Mowbray*, 3 id. 234; *Masters v. Hooper*, 4 id. 207; *Jones v. Colbeck*, 8 Ves. 38; *Cruwys v. Colman*, 9 id. 319; *Cole v. Wade*, 16 id. 27; *Walter v. Maunde*, 19 id. 424; *Forbes v. Ball*, 3 Mer. 437; *Pope v. Whitcombe*, id. 689. *Devisme v. Mellish*, 5 Vesey, 529. In *Edge v. Salisbury*, Amb. 70: "Such of my nearest relations as my executors shall think the greatest objects of charity," was held to extend only to such as would take under the statute of distributions. The same rule obtains in New Hampshire. *Varrell v. Wendell*, 20 N. H. 431.

to devises of real estate.⁶⁵ In *Rayner v. Mowbray*,⁶⁶ the Lord-Chancellor, *Thurlow*, said: "The difficulty was, how to construe the * word '*relations*' but by a reference to the statute * 86 of distributions. If it was a recent matter, there might be a doubt. . . . When once a rule has been laid down, it is best to abide by it. We cannot always be speculating what would have been the best decision in the first instance." But where the words of the will clearly indicate that others, not entitled under the statute, were intended to take, they will be admitted.⁶⁷

31. In a large proportion of the English cases where this rule has been applied, it has evidently defeated the intention of the testator. In a case⁶⁸ where the testator gave the residue of his estate to his wife for life, with direction to dispose of the residue amongst his relations, in such manner as she should think fit, and she appointed it to relations, not next of kin, it was held a void appointment, and the same was decreed to be distributed among those who were next of kin to the testator at the time of his death.

32. The case last referred to admitted the representatives of a deceased next of kin to take concurrently with the surviving next of kin of the same degree as the deceased person thus represented. And as this point was expressly made in the argument, it is difficult to perceive why that was not expressly determined by the decision, notwithstanding the highest authority is cited in favor of

⁶⁵ *Doe d. v. Over*, 1 Taunt. 263. The testatrix directed all her property at her decease should pass "to my relatives in America;" and Lord *Romilly*, M. R., in *Eagles v. Le Breton*, L. R. 15 Eq. 148, held, that "the next of kin of the testatrix in America, living at her death, were entitled as joint-tenants."

⁶⁶ 3 Br. C. C. 234.

⁶⁷ *Greenwood v. Greenwood*, 1 Br. C. C. 30 in n. No distinction is made between the word "relation," in the singular number, and "relations," in the plural. *Pyot v. Pyot*, 1 Ves. Sen. 335; *Marsh v. Marsh*, 1 Br. C. C. 293. In the late English case, *Re Caplin*, 11 Jur. n. s. 383, s. c. 13 W. R. 646, a power to appoint to the testator's "relations or friends" was held to be a special power, and must be specifically performed; that relations or friends could receive no different construction from "relations;" that the appointee might have selected relations beyond the next of kin; but, not having done so, the court could only imply a trust for the next of kin. The learned judge here relied upon *Gower v. Mainwaring*, 2 Ves. Sen. 87. See also *Roach v. Hammond*, Prec. in Ch. 401. The term "relation" in Mass. Gen. Stat. ch. 92, § 28, relative to devises to a "child or other relation of the testator," does not embrace the wife. *Esty v. Clark*, 101 Mass. 36.

⁶⁸ *Pope v. Whitcombe*, 3 Mer. 689.

the opposite conclusion.⁶⁹ But however that may be, it seems now agreed on all hands, that by the present well-established rule of the English equity courts, after those relations coming within the statute of distributions who are entitled to take under the bequest are ascertained, they will take per capita, and not per stirpes;⁷⁰

and, in general, such persons will take in equal shares, unless,
 * 87 as * we have before seen, there is something to indicate a different intention. And where the words of the will direct an equal distribution, there can be no question.⁷¹ Where all are of equal degree, no such question can arise.⁷²

33. The addition of the terms "next" or "nearest," in a gift to relations, has been held not to vary the import;⁷³ and surviving brothers and sisters will exclude the children of such as are deceased,⁷⁴ and this will be so under the will, notwithstanding a different result would follow under the statute.⁷⁵ But where the testator added, "as sisters, nephews, and nieces," it was held to indicate a purpose to have the legatees take per stirpes, and not per capita.⁷⁶

34. On a limitation, by settlement, to the next of kin, they take the same as under the statute of distributions, there being no distinction between the whole and the half blood.⁷⁷ And the same rule applies to bequests.

35. On bequests to the next of kin, only those by blood are entitled, as we have before said.⁷⁸ But any such expressions, as "by

⁶⁹ 2 Sug. Pow. 246; 2 Jarman, 109.

⁷⁰ *Harding v. Glyn*, 1 Atk. 469; *Cruwys v. Colman*, 9 Vesey, 319; *Wright v. Atkyns*, 19 Vesey, 299; s. c. 1 Ves. & B. 313; *Tiffin v. Longman*, 15 Beav. 275; *Rand v. Sanger*, 115 Mass. 124.

⁷¹ *Thomas v. Hole*, Cas. t. Talbot, 251; *Green v. Howard*, 1 Br. C. C. 31; *Rayner v. Mowbray*, 3 Br. C. C. 234; *Butler v. Stratton*, id. 367.

⁷² *Cole v. Wade*, 16 Vesey, 27; *Ham's Trust*, 2 Sim. n. s. 106.

⁷³ *Whithorne v. Harris*, 2 Ves. Sen. 527; *Smith v. Campbell*, 19 Vesey, 400.

⁷⁴ *Pyot v. Pyot*, 1 Ves. Sen. 335; *Marsh v. Marsh*, 1 Br. C. C. 293; *Smith v. Campbell*, 19 Vesey, 400.

⁷⁵ *Withy v. Mangles*, 4 Beav. 358; s. c. 10 Cl. & Fin. 215.

⁷⁶ *Stamp v. Cooke*, 1 Cox, 234.

⁷⁷ *Cotton v. Scarancke*, 1 Madd. 45.

⁷⁸ *Ante*, pl. 10; *Maitland v. Adair*, 3 Vesey, 231; *Harvey v. Harvey*, 5 Beav. 134; *Craik v. Lamb*, 1 Coll. C. C. 489, 494. In the last case some doubt seems to have been entertained by the learned judge, *Sir J. L. Knight Bruce*, how far "next of kin" necessarily implied relations by consanguinity only; but the later cases seem to treat the matter as clearly settled in favor of the rule stated in the text.

blood or marriage," "on both sides," and the like, clearly indicate an intention to include relations by affinity as well as by blood. Thus under a bequest to "any other nephews and nieces on both sides," it was held that the children of the brothers and sisters of the testator's wife were included.⁷⁹

36. Bequests to the *most deserving* of the testator's relations has been held to create no legal qualification, it is so indefinite.⁸⁰ So also in regard to a bequest to the "most necessitous of my * relations," it was held to go according to the statute of dis- * 88 tributions.⁸¹

37. Bequests to poor relations, one of the testator and one of his wife, the direct management thereof to be left to the discretion of his executors, has been held to create a charity for the benefit of poor relations within the statute of distributions.⁸² And in *Brunsdon v. Woolredge*,⁸³ the question arose in regard to two wills. The first gave a sum of money to be "equally distributed among his mother's poor relations;" the other also gave a sum of money to be paid to such of his mother's poor relations as his executors should think objects of charity, and in such proportions as they should think fit. The Master of the Rolls, Sir *Thomas Sewell*, said: "The question is the same under both the wills, with respect to the objects. . . . I am of opinion the true construction of the words is, 'such of my mother's relations as are poor and proper objects' " of charity. So a bequest for the purpose of putting out "our poor relations' apprentices" was sustained as a charity.⁸⁴ The rule seems finally to have settled down upon the views presented by Lord *Redesdale*, Chancellor, in *Mahon v. Savage*,⁸⁵ that where a person has a power of distribution among poor relations, he may distribute among all poor relations, however remote. But where the court is called upon to distribute, in failure of the person so empowered, it will confine itself within the limits of the statute of

⁷⁹ *Frogley v. Phillips*, 6 Jur. n. s. 641.

⁸⁰ *Doyle v. Attorney-General*, 2 Eq. Cas. Ab. 194, pl. 15.

⁸¹ *Widmore v. Woodroffe*, Amb. 636; s. p. *Anon.* 1 P. Wms. 327. This case is regarded as having overruled that of *Attorney-General v. Buckland*, cited in *Edge v. Salisbury*, Amb. 71, n.; 2 Jarman, 113.

⁸² *Isaac v. DeFriez*, 17 Vesey, 373 in n.; Amb. 595; *Attorney-General v. Price*, 17 Vesey, 371.

⁸³ Amb. 507. The learned judge here cites *Carr v. Bedford*, 2 Ch. Rep. 77, (146); *Griffith v. Jones*, 2 Freem. 96, in confirmation of his decision.

⁸⁴ *White v. White*, 7 Vesey, 423.

⁸⁵ 1 Sch. & Lef. 111.

distributions.⁸⁶ But in these cases a relation who was poor at the time of the testator's death, but became rich before the time of distribution, is not entitled. And poor relations, dying before distribution, do not transmit their claim to their personal representatives.⁸⁶

* 89 * 38. There seems to have been a good deal of controversy as to the time at which the next of kin shall be ascertained. If the bequest is to the testator's next of kin, whether a life-estate intervene before actual possession or not, the persons who sustain that relation, at the death of the testator, are entitled, whether living or not, at the time their right of possession accrues.⁸⁷

39. But if a devise be made to A., and after his death to the heirs of B., and B. die in the lifetime of A., the person who was his heir at the time of his decease shall take, and not the one who would have been his heir at the time of the decease of A.⁸⁸ The rule seems to be that the persons entitled are to be ascertained, as of the time when the interest vests, but the interest often vests at a time prior to the right of possession.⁸⁹ And accordingly, where a life-estate is created, and, after its expiration, the estate is devolved upon J. S., and in case of his death before the termination of the life-estate, it is provided the same shall go to his legal representatives, and J. S. dies during the life of the tenant for life, the estate being personal, it will go to the persons who would be entitled under the statute, as next of kin of J. S., who take vested interests, as of the death of J. S.⁹⁰ But there are some cases where

⁸⁶ *Harding v. Glyn*, 1 Atk. 469. His lordship also referred to a case before Lord *Mansfield* in support of the latter portion of the proposition. In these cases the charity is administered by a scheme settled by the Master. See also *Cruwys v. Colman*, 9 Vesey, 319. And in *M'Neilledge v. Galbraith*, 8 S. & R. 43, a bequest to the poor relations of the testator was given to his brothers and sisters, "as if the word 'poor' were not in the will." Sed quære? And real estate under such a bequest is treated the same as personal. *M'Neilledge v. Barclay*, 11 id. 103.

⁸⁷ *Harrington v. Harte*, 1 Cox, 131; *Rayner v. Mowbray*, 3 Br. C. C. 234, where it is said: "Though the distribution is deferred, . . . that does not prevent the interest vesting at the death of the testator." *Masters v. Hooper*, 4 Br. C. C. 207. See also *Doe d. v. Lawson*, 3 East, 278; *Collisam v. Sams*, Taml. 346; *Maxton in re*, 4 Jur. N. s. 407; *Day v. Day*, 18 W. R. 417.

⁸⁸ *Danvers v. Earl of Clarendon*, 1 Vern. 35.

⁸⁹ *Cruwys v. Colman*, 9 Vesey, 319.

⁹⁰ *Smith v. Palmer*, 7 Hare, 225. See also *Gundry v. Pinniger*, 14 Beav. 94; s. c. 1 DeG., M. & G. 502; *Walker v. Marquis of Camden*, 16 Sim. 329.

such an intention is either clearly expressed in, or inferable from, the will itself, that the persons entitled have been ascertained as of the time the estate comes into possession.⁹¹

40. The addition to the words "next of kin," "living at the time the estate comes into possession," will not defer the period of ascertaining such next of kin, but will only have the effect of * limiting the estate to such of the next of kin as exist at the * 90 time the estate vests, and who shall survive until the estate comes into possession.⁹² But this rule of construction seems to us adhering to the letter at the expense of the probable intent, in the majority of cases.

41. And it has been held not to vary the construction, that the tenant for life is one of the next of kin.⁹³ But in another case⁹⁴ it was held that where the tenant for life was the sole next of kin of the testator at his decease, it was sufficient ground to presume an intention in the testator to include only the next of kin after the decease of the tenant for life.⁹⁵ And in *Briden v. Hewlett*,⁹⁵ the same rule is recognized, the Master of the Rolls, Sir *John Leach*, saying: "It is impossible to contend that this testator meant to give the property in question absolutely and entirely to his mother, because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as *would* be entitled to it by virtue of the statute of distributions. Entitled at what time? The word '*would*' imports that the testator intended his next of kin at the death of

⁹¹ *Booth v. Vicars*, 1 Coll. C. C. 6; *Godkin v. Murphy*, 2 Y. & C., C. C. 351. In regard to these last cases, see the remarks of the learned judge who decided them, Sir *James Wigram*, V. C., in *Bird v. Luckie*, 8 Hare, 301, 307, 308. See also 1 DeG., M. & G. 504.

⁹² *Spink v. Lewis*, 3 Br. C. C. 355. The emendators of the head-note of this case, in some of the late editions of these reports, do not seem to have apprehended the principle upon which the decision rests. See *Bishop v. Cappel*, 1 DeG. & S. 411.

⁹³ *Holloway v. Holloway*, 5 Vesey, 399. Sir *R. P. Arden*, M. R., here said: "Prima facie, these words must be understood in their legal sense, unless by the context, or by express words, they plainly appear to be intended otherwise."

⁹⁴ *Jones v. Colbeck*, 8 Vesey, 38. But Vice-Chancellor *Stuart* made rather a slighting remark in regard to the authority of this case. In *re Trusts of Barber's Will*, 1 Sm. & Gif. 118, 122.

⁹⁵ 2 My. & K. 90.

his mother. It is clear that he meant to exclude his mother from the class who were to take in the event of her intestacy."

42. And where the testator provides for a life-estate, and for the remainder to go to his sons, and in the event of their decease before the termination of the life-estate, that the estate shall go to the next of kin, it has been held that, as his sons were his next of kin at his decease, he must have intended the next of kin after their decease, and that it was therefore natural to conclude that he intended the next of kin, at the termination of the life-estate.⁹⁶

And in *Butler v. Bushnell*,⁹⁷ where the testator gave a part of
 * 91 the * residue of his estate to his daughters during their lives, and after their decease to their children, and in default of such children, to such persons as should happen to be his next of kin, it was held to mean next of kin at the time of the contingency. The Master of the Rolls, Sir *J. Leach*, said: "It is not a probable intention that he (the testator) should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over. . . . The court always considers whether the words of limitation are words of present intention, . . . or whether they import a future period, and are referable to the event upon which the gift over is to take effect. The words 'such persons as shall happen to be my next of kin,' or 'such persons as shall or should be my next of kin,' indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the death of the tenant for life." In *Holloway v. Radcliffe*,⁹⁸ Sir *J. Romilly*, M. R., said: "By referring to the statute, to point out the persons who are to take, the testator has expressed that those are to take whom the statute of distributions designates; that is, certain persons who are living at the death of the person whose estate is to be distributed." But it is here intimated that the words "legal personal representatives" are not of so strict and unbending force in this respect as "the next of kin," "and consequently are not pointedly affected by the observations applicable to the words 'next of kin,' to be found in *Cable v. Cable*,⁹⁹ and *Markham v. Ivatt*."¹⁰⁰

⁹⁶ *Miller v. Eaton*, Coop. 272.

⁹⁷ 3 My. & K. 232.

⁹⁸ 23 Beav. 163, 169.

⁹⁹ 16 Beav. 507.

¹⁰⁰ 20 Beav. 579. See also *Wharton v. Barker*, 4 Kay & Johns. 483.

43. In the case of *Pearce v. Vincent*,¹⁰¹ the tenant for life was also the nearest of kin at the death of testator, to whom the estate was, in the event of his decease without appointment, directed to go; and the Court of Exchequer,¹⁰² to whom the case was first sent for advice, were of opinion there was no inconsistency in supposing the testator might have intended the same person, both for tenant for life and in remainder. But the opinion was not satisfactory to the Master of the Rolls,¹⁰¹ and the case was sent to the Common Pleas,¹⁰³ who concurred in opinion with the Court of Exchequer;¹⁰² and Lord *Langdale*, the Master of the Rolls at the period of the * final determination of the case, concurred in opinion * 92 with the courts of law, and gave judgment accordingly.¹⁰⁴

44. And where the testator gave to his daughter for life, and

¹⁰¹ 2 My. & K. 800.

¹⁰² 1 Cro. & Mee. 598.

¹⁰³ 2 Bing. N. C. 328.

¹⁰⁴ 2 Keen, 230. The case of *Urquhart v. Urquhart*, 13 Simons, 613, holds the same view. The cases are here extensively reviewed by the Vice-Chancellor, Sir *L. Shadwell*. And the same rule is adopted by the same learned judge in *Nicholson v. Wilson*, 14 Sim. 549, upon the authority of *Masters v. Hooper*, 4 Br. C. C. 207, saying: "The argument for the plaintiff in this case was founded entirely on conjecture; but conjecture does not authorize the court to depart from the plain meaning of the words which are found in the will." And the same rule, substantially, was applied to the case of *Seifferth v. Badham*, 9 Beav. 370, by Lord *Langdale*, M. R. And in *Baker v. Gibson*, 12 Beav. 101, the same learned judge considered the rule so fully settled in that direction, that he would not allow the bill to be amended with a view to open it anew. So that the law in England is now regarded as fully settled; but, with all due respect for its wisdom and justice, we must say, that, in such unbending persistence, in that direction especially, the English courts have manifested more solicitude to preserve its uniformity and definitely settled character, than its consistency, either with reason or the probable intention of the testator, in the majority of cases. The only apology which occurs to us, at the present moment, in favor of fixing this definite construction upon the gift over, which may carry it to the same parties whose interest had already been provided for in the terms of the will, and effectually excluded, is that, in the making such a final gift over, the testator could not be supposed to have had much reference to any particular persons, and only adopted a general form of expression with a view to avoid an ultimate intestacy. We shall have occasion to refer to the American cases hereafter. The English cases referred to in confirmation of the rule finally settled there are: *Ware v. Rowland*, 15 Sim. 587; s. c. 2 Phill. C. C. 635; *Murphy v. Donegan*, 3 Jo. & La. T. 534; *Bird v. Luckie*, 8 Hare, 301; *Jennings v. Newman*, 10 Sim. 219; *In re Barber*, 1 Sm. & Gif. 118; *Gorbell v. Davison*, 13 Beav. 556; and many other cases already adverted to.

after her death to her children, and, in the event of his daughter dying without issue or making no appointment, to the nearest of kin of his own family, for ever, it was held that under this last clause were included the next of kin of the daughter.¹⁰⁵

45. The same rule has been applied to bequests, ultimately, to the next of kin of third persons, as we have already stated.

* 93 in regard * to bequests to the next of kin of the testator.¹⁰⁶

This seems to be the general rule of the English law as at present recognized.

46. The exceptions to this general rule, where it has been considered that the testator had sufficiently indicated an intention to have the estate go to some other one than the tenant for life, are considerably numerous, and clearly evince a consciousness in the courts, that they do not rest upon any very satisfactory basis, which would not equally bring the majority of all the cases of that character under the same view, and thus establish the general rule, as the early cases did incline to do, upon the same basis as the exceptions now rest upon. It does not seem important to consider these exceptional cases (as they have been regarded) in detail, since their peculiar facts would scarcely make them a rule for other cases not precisely similar, which would not be likely to occur, unless at long intervals and by wonderful coincidences. We can then only state the basis upon which all these exceptional cases profess to rest; that is, that the testator has sufficiently indicated, by the context of the will, that he intended, in his gift

¹⁰⁵ *Clapton v. Bulmer*, 10 Sim. 426; s. c. affirmed by the Lord Chancellor, 5 Myl. & Cr. 108. His lordship held that the words were clearly intended to identify an individual who was to be ascertained at a future period; that the words admitted of two constructions, namely, either the next of kin of the daughter at the time of her death, or the next of kin of the testator at the same period; and that, as the same individual filled both characters, it was unnecessary to decide in which capacity he took.

¹⁰⁶ *Stert v. Platel*, 5 Bing. N. C. 434. Stress is here laid upon the fact that the testator does not in terms fix upon any other time than that of his death for determining the next of kin. For although he uses the word *shall*, which he might well do with reference only to the prospective period of his own death, as the person who *shall* be my next of kin, and although this is said with reference to a period after his death, as at the termination of the estates specially defined, he does not say, the person who *shall then* be my next of kin. This certainly has the appearance of a rather nice refinement, and one steering quite one side of the presumptive purpose of the testator. But the result is symmetry, if not sound reason.

over, that the estate should go to some other person than those to whom he had before given special and limited interests. Mr. Jarman, in the latest edition of his work, names the following cases under the head of exceptions to the foregoing general rule.¹⁰⁷

* 47. And where the gift over is limited, in express terms, * 94 to such persons as shall *then* be next of kin, or relations of the testator or any other person, in any particular degree, the persons answering the description must be ascertained, as of the time when the gift over takes effect. We have already noticed some cases to this effect, and others may be referred to.¹⁰⁸ And a similar decision is made in regard to a marriage settlement in *Pinder v. Pinder*.¹⁰⁹ But the general rule of the English courts was reaffirmed by Sir *John Romilly*, M. R., in *Lees v. Massey*,¹¹⁰ after a careful review of the authorities.

48. The word "then" is often used with reference to future events in a will, in such a manner as to be synonymous with "thereupon," and as indicating the order of events, rather than as fixing the definite period at which an act is to be carried into effect. In such cases it has often been considered that even where the word "then" occurs, as showing the event of a gift over, it did not so indicate the period of ascertaining the persons to whom the gift over was made, as to justify a departure from the general rule

¹⁰⁷ *Bird v. Wood*, 2 S. & S. 400; s. c. cited in *Elmsley v. Young*, 2 My. & K. 86, 89; *Lee v. Lee*, 1 Drew. & Sm. 85; *Minter v. Wraith*, 13 Sim. 52; *Cooper v. Denison*, 13 Sim. 290. In this last case the word "other" was prefixed to the "next of kin" to whom the gift over was made, and it was held sufficient to indicate the purpose of the testator that it should go to different persons.

And where a gift to the next of kin is implied from the existence of a power in the legatee for life to appoint by will the direction in which the estate shall go, whether it be a power of selection or only of distribution, it has been common to ascertain those persons who are entitled, as of the death of the first donee. *Doyley v. Attorney-General*, 4 Vin. Ab. 485, 486; *Harding v. Glyn*, 1 Atk. 469; *Cooper v. Denison*, 13 Sim. 290; *Pope v. Whitcombe*, 3 Mer. 689; *Finch v. Hollingsworth*, 21 Beav. 112.

¹⁰⁸ *Long v. Blackall*, 3 Vesey, 486; *Horn v. Coleman*, 1 Sm. & Gif. 169; *Wharton v. Barker*, 4 K. & J. 483. In this last case all the cases are reviewed by a learned and experienced judge, — Vice-Chancellor *Wood*. The same rule is declared by Vice-Chancellor *Kindersley* in *Travis v. Taylor*, 12 Jur. n. s. 791; s. c. 14 W. R. 909.

¹⁰⁹ 6 Jur. n. s. 489; *Chalmers v. North*, id. 490; s. c. 8 W. R. 426.

¹¹⁰ 6 Jur. n. s. 2.

of the English courts.¹¹¹ And even a gift over to the testator's "own next of kin *for the time being*," was held not sufficient to vary the English rule of referring such inquiries to the period of the testator's death.¹¹²

49. Bequests are often made to those of the name of the testator, which may mean such as bear his name, which is the more natural and primary import of the term; or it may be used as indicating those of the testator's family or blood. The former is the construction given to such a bequest, unless from the context it appear that a different meaning was attached to the term.¹¹³

* 95 * 50. In Jobson's case¹¹⁴ the testator devised lands in tail, the remainder to the next of kin of his name. At the time of the devise the next of kin was the testator's brother's daughter, who was then married to J. S. The devisee died, and also the tenant in tail, without issue. It was held, that the daughter could not take under the devise, not being at the time of the name of the devisor, but of her husband's name. But it is said here that if she had been unmarried, at the time of the death of the donor, and also of the date of the devise, she could have taken, notwithstanding she might have been married at the death of the tenant in tail. And it seems accordingly to be settled that married women are no longer of the name of their family, but of that of their husbands.

51. And where one acquires a new name by legislative act, or by royal license, he does not thereby lose his former name, it is

¹¹¹ Cable v. Cable, 16 Beav. 507. See also Wheeler v. Addams, 17 Beav. 417; Downes v. Bullock, 25 Beav. 54. See also Archer v. Jagon, 8 Sim. 446.

¹¹² Moss v. Dunlop, Johns. (Eng. Ch.) 490.

¹¹³ 2 Jarman, 128.

¹¹⁴ Cro. Eliz. 576. The expression here is "next of kin of his name," and in Leigh v. Leigh, 15 Vesey, 92, "next of his name and blood," which seems to indicate clearly that the testator had reference to the *name*. See also Bon v. Smith, Cro. Eliz. 532, and Lord Hardwicke's strictures upon that case and Jobson's in Pyot v. Pyot, 1 Ves. Sen. 335, where his lordship held that the "nearest relation of the name of Pyot" included the family or stock of the Pyots as *nomen collectivum*. So also in Mortimer v. Hartley, 6 Exch. 47. And the word *surname* has been thought by some even more readily convertible into family or stock than the name merely. Carpenter v. Bott, 15 Sim. 606. But the principle of the distinction is questioned by Mr. Jarman. 2 Jarman, 131. In Oddie v. Woodford, 3 My. & Cr. 584, the designation "eldest male lineal descendant" was held not applicable to one claiming in part through a female.

said, but may still take a legacy or devise by such name.¹¹⁵ In this latter case it was held that a remainder to the first and nearest of the testator's kindred being male and of the same name and blood, to entitle one to claim, he must be of the name as well as the blood, and that the qualification as to the name is not satisfied, by having the name taken by the king's license before the determination of the preceding estates. The judges who sat with the Chancellor in this case advised him that, to satisfy the requirements of the words of the will, the claimant must be one whose family name corresponded with that of the testator.¹¹⁶

52. The question will arise in these cases, at what time the devisee or legatee must answer the required name. The early * cases of *Jobson*,¹¹⁷ and *Bon v. Smith*,¹¹⁸ as we have * 96 before said as to the former, held it sufficient that the claimant bore the name at the death of the testator. But in *Pyot v. Pyot*,¹¹⁹ Lord *Hardwicke* held, that the rule laid down in the cases last referred to might well apply to a vested remainder, but would not apply to executory devises, where the successive estates were not vested, but contingent, and consequently that the name or description of the person must refer to the time of the contingency happening, and the estate vesting. This rule, if maintainable, which Mr. Jarman seems to question,¹²⁰ would apply to all contingent interests, thus postponing the period of ascertaining the persons intended, until the contingency occurred, which, as suggested by Mr. Jarman, would seem to run counter to a large number of the cases already discussed, but would, at the same time, in all reasonable probability, restore the rule of the English courts nearer to the general purpose and understanding of those who draw as well as those who execute, testamentary dispositions of property, with such provisions. For these reasons, although we might rejoice to see the rule suggested by Lord *Hardwicke*, in *Pyot v. Pyot*, generally recognized, we apprehend the preponderance of English authority may still be in the opposite direction.

53. A gift to servants, in general unqualified terms, it has been said, will take effect in favor of servants, at the date of the will,

¹¹⁵ Lord *Eldon* in *Leigh v. Leigh*, 15 Vesey, 92, 100.

¹¹⁶ Citing *Barlow v. Bateman*, 3 P. Wms. 65; s. c. 2 Bro. P. C. 272; *Pyot v. Pyot*, 1 Vesey. Sen. 335.

¹¹⁷ Cro. Eliz. 576.

¹¹⁸ Id. 532.

¹¹⁹ 1 Ves. Sen. 335.

¹²⁰ 2 Jarman, 133.

notwithstanding they may quit the testator's service before his death.¹²¹ In the last case cited, the testator, by a codicil, bequeathed pecuniary legacies to certain persons by name, who were described * as having been many years in his family, and then added "to the other servants £500 each." And it was held that a person who was in the testator's service at the date of the codicil, but who quitted it before his decease, was entitled to a legacy of £500.

54. Some question has been made in regard to the particular character of service requisite to make one answer the term "servant," but as the term has had very little application in this country, except in regard to a class of persons incapable of taking bequests, by reason of their hitherto subordinate civil status, which is now happily removed, it would not be useful to explain minutely how this term is used in England and other European countries.¹²²

¹²¹ 1 Jarman, 306; *Parker v. Marchant*, 1 Y. & C., C. C. 290. But it is questionable whether the expression here used, "to the other servants," was not the chief reason for restricting its application to the persons then in the service of the testator, and holding that it would not apply to those who subsequently entered the testator's service, though remaining in it until the time of his death. The use of the definite article in that manner seemed to restrict its application to "the other servants" then in the testator's service. But it is questionable, perhaps, how far a legacy to "my servants" would be held to apply to those in the testator's employment at the date of his will, but who left, and whose places were supplied by others, before his death. It would seem, upon general principles, giving the words their natural force, as of the time when they became operative, that is, the death of the testator, that such a bequest should go to the servants who continued to serve the testator to the end of his life, whether in his service at the date of the will or not. See ante, vol. 1, § 30, pl. 10.

¹²² In *Ogle v. Morgan*, 16 Jur. 277, s. c. 10 Eng. L. & Eq. 92, the testator gave "to each person, as a servant in my domestic establishment, at the time of my decease, a year's wages beyond what shall be due to him or her for wages." And it was held, reversing the decree of Vice-Chancellor *Knight Bruce*, by Baron *Truro*, Lord Chancellor, that a head gardener did not come within the description of a servant in the domestic establishment. But his lordship inclined to think that the circumstance of a servant being hired by the year, but paid weekly, would not have excluded him from the legacy. And under a bequest "to all my servants living with me at my decease, and who shall have then lived in my service for three years, one year's wages," it was held to extend to servants who were in the employment of the testator, although not resident in the same house, but that it did not extend to any who had never entered into any contract of yearly hiring, or in which a yearly wage was agreed upon; and therefore a gardener who was engaged at a fixed sum

* 55. A legacy to the poor inhabitants of a particular place * 98 or parish creates a good charity, and is to go to the poor of that place not receiving alms.¹²³ It is here said that a legacy to the poor, without more, is good, and the persons to take shall be judged of by circumstances, citing *Attorney-General v. Ronee*, decided in 1728, where there was nothing in the will to determine what poor the testator meant; but it appearing that he was a French refugee, the court ordered it to be paid for the benefit of the poor refugees.

56. The term "relatives," in the American courts, applies, ordinarily, to persons in the line of consanguinity, and not to those connected by marriage. Where the gift is to relatives, resort must be had to the statute of distributions to determine who are entitled; but when the testator specifies a certain number of the "nearest" relatives, the description will be applied indepen-

per week, although paid at irregular intervals, was not included. *Blackwell v. Pennant*, 10 Eng. L. & Eq. 270; s. c. 16 Jur. 420. In one of the latest cases upon this subject, *Darlow v. Edwards*, 9 Jur. n. s. 336, s. c. 1 Hurist. & C. 547, it was decided that where a testator bequeaths an annuity to his servant Sarah, "provided she shall be in my service at the time of my decease," and a few days before his decease dismissed her, without cause; as she was not, in fact, in his service at the time of his decease, she was not entitled to the legacy. So also where one gave a legacy upon the same conditions, and the testator becoming insane, and being removed to an asylum, the legatee, who was a yearly servant, voluntarily quitted the house, receiving her wages from the family to the end of the year, before the expiration of which the testator deceased, it was held she was not entitled to her legacy. *Venes v. Marriott*, 31 Law J. Ch. n. s. 519; s. c. 6 Law T. n. s. 892, before Vice-Chancellor Wood. A coachman, provided for the testator by a job-master, with coach and horses, is not embraced in the terms "all the other servants." *Chilcot v. Bromley*, 12 Vesey, 114. So also a gardener or cow-boy, employed upon weekly wages, and not forming part of testator's family, is not entitled to any share in a provision for servants. *Booth v. Dean*, 1 My. & K. 560. But a farm bailiff is. *Bulling v. Ellice*, 9 Jur. 936. Oral proof is admissible to show testator regarded a person still in his service, although she had left his house. *Herbert v. Reid*, 16 Vesey, 481. See also *Rogers v. Thomas*, 2 Keen, 8; ante, vol. 1, § 37, pl. 13, and note.

¹²³ *Attorney-General v. Clarke*, Amb. 422. The Master of the Rolls, Sir Thomas Clarke, said here: "It could not be intended that the poor inhabitants which are relieved by the parish should have benefit by this legacy, which in effect would be giving to the rich, and not to the poor;" it must therefore be confined to the poor inhabitants not receiving alms; and he therefore ordered a scheme for administering the charity accordingly.

dently of the statute.¹²⁴ Where the gift is to "relatives" or "connections," substitution may be intended, but connections by affinity will not take, until the class of relatives by blood is exhausted.¹²⁴

57. It is declared in a recent case¹²⁵ to be a sound and safe rule, that where bequests are made to heirs, or representatives, that the force of the terms will be fixed by the force of the statutes regulating the descent and distribution of estates, unless a different intention is apparent; and that as the statute governs in all cases where there is no will, it should be applied to solve the doubts which rise in other cases. And a bequest to the testator's heirs at law means such as answer the designation at the time of the testator's decease; and a different intent is not to be inferred,^{*} because an intervening life-estate is first given to some of the heirs, or because a bequest is given to one of the heirs in full of her share.¹²⁶

58. And in another case¹²⁷ a devise to "the surviving children of my late sister A., not knowing their names, they living in the State of Maine, to be divided equally among them all," was construed to embrace all those children surviving at the date of the will; and if one of them afterwards dies leaving issue, before the death of the testator, such issue will take the share of the parent deceased under the statute of Massachusetts governing such cases.

59. A policy of insurance effected by the intestate, and expressed to be payable on his decease "to his heirs or representatives," is not expressed to be for the benefit of any third person, within the meaning of the Massachusetts statute,¹²⁸ but is payable to the administrator, as part of the assets of the estate; and oral declarations of the assured, after receiving it, that he intended it for the benefit of his son, are not admissible to vary the construction.¹²⁹

¹²⁴ *Ennis v. Pentz*, 3 Bradf. Sur. Rep. 382.

¹²⁵ *Lyon v. Acker*, 33 Conn. 222. See also *Newton's Trusts*, Law Rep. 4 Eq. 171: Upon the general subject of the disposition of residuary bequests after the life-estates therein, see *Gibbs v. Tait*, 8 Sim. 132; *Taylor v. Beverley*, 1 Coll. C. C. 108; *Turing v. Turing*, 15 Sim. 139. Disposition of the intervening estates. *M'Donald v. Bryce*, 16 Beav. 581.

¹²⁶ *Abbott v. Bradstreet*, 3 Allen, 587. But see *Quick v. Quick*, 21 N. J. Eq. 13, where a different rule was applied to the particular case.

¹²⁷ *Morse v. Mason*, 11 Allen, 36.

¹²⁸ Gen. Stats. c. 58, § 62.

¹²⁹ *Wason v. Colburn*, 99 Mass. 342.

SECTION VI.

RESIDUARY BEQUESTS. DESCRIPTION OF THE SUBJECT-MATTER OF THE BEQUEST.

1. The words "goods, chattels, or effects," used jointly or separately, may include all personality.
 2. The word "effects" is more general in its operation than the others.
 - n. 3. Digest and comment upon the cases upon this point.
 3. The exceptions to the general and unrestricted use of these terms.
 - (1.) These terms used with reference to a particular locality, as "in my house."
 - (2.) Classification of the cases with the exceptions.
 - n. 8. How far bank-notes and choses in action have any fixed locality.
 - n. 11. The effect of particular words preceding or following general words.
 - (3.) The direction of the will in regard to the application of a bequest may aid the construction.
 - (4.) Giving particular legacies, after general one, often limits the extent of the general words.
 - n. 15. The force of this qualification considered and limited.
 - (5.) This point further considered and discussed.
 - (6.) The unsatisfactory grounds upon which many of the early cases proceeded.
 - (7.) Gift of the residue of all the testator's money may carry the whole residuum.
 - (8.) An exception sometimes shows the sense of the preceding terms.
 - n. 25. The adherence to rules often leads one side of the testator's intent.
 - (9.) Jarman's view of the law. The effect of a residuary clause in limiting prior general words.
 - (10.) Where no other residuary clause, words less general will carry the residue.
- * 4. The residuary bequest carries every thing not otherwise efficiently disposed of. * 100
5. Courts lean against intestacy as to any portion of the property. It requires very special words to restrict a residuary bequest.
 6. Lapsed legacies fall to the residuary legatee.
 7. It is important to observe whether enumeration in residuary bequests is intended to limit, or explain.
 8. But if a portion of the residuary bequest fails, it will not go to increase the remainder.
 9. A residuary bequest may be so defined as to assume the incidents of particular bequests.
 10. If the extent of the word "residue" is ambiguous, courts give it a general operation.
 11. Error apparent on face of will, by way of miscalculation, corrected by construction.
 12. One considered as possessed of what he has contracted for.
 13. The word "jewels" is sometimes used in wills in different senses.

14. How far the word "books" includes manuscript notes bound in volumes.
15. Any error in the description of subject-matter of bequest readily set right.
16. The interest of the mortgagee is merely that of personalty, until foreclosure perfected.
17. Almost all terms descriptive of subject-matter in a bequest, qualified by preceding words, and limited to things ejusdem generis.
18. Bequest of \$500, out of such property as legatee may select, will not justify taking real estate.
19. Bequest of interest does not generally create an annuity.
20. Bequest of the amount of a note held to pass the note merely.
21. The terms "estate" and "property" held to include both realty and personalty, unless clearly proved to the contrary.
22. How far real or personal estate, not effectually disposed of by the will, passes under the residuary bequest.
23. Bequests of a "home," and "support," how construed.
24. Bequest of copyright, how construed.
25. Construction of terms "provisions," "estate," and "wearing apparel."
26. Devise of a "house" carries all within the "curtilage."
27. Bequest of cabinet and contents will not carry a promissory note.
28. Ready money embraces dividends due on stocks, &c.
29. All debts due will carry a bond conditioned to replace stock.
30. Bequests of principal will not carry interest. Lapse of joint residuary bequests.
31. Legacy or legatees held not to embrace devise or devisee.
32. Extent of the terms "property" and "personal property."
33. The extent of the terms "money," "funds," "shares," "interest," &c.
34. Exposition of the force of many descriptive forms of language, as applied to estates devised.
35. Certain trusts imposed upon residuary legatee will not defeat his beneficial interest.
36. Bequest of partner's interest in leaseholds carries only what remains after debts paid.

§ 6. 1. It seems to be perfectly well settled that the terms "goods," "chattels," or "effects," whether used separately or in conjunction, as they often are in wills, must be held to include all kinds of personal estate of which the testator dies possessed, * 101 * unless there is something to indicate that the words are used in a more restricted sense. But the words "goods and chattels" have naturally a more restricted signification than the word "effects." The former terms more naturally apply to personalty in possession, and of the ordinary kinds, and not to choses in action, or to money, or to chattels real.¹

2. But the word "effects" is more commonly used in the most extended sense as synonymous with property or estate.² In

¹ *Mullins v. Smith*, 1 Drew. & Sm. 204; s. c. 8 W. R. 739.

² *Campbell v. Prescott*, 15 Vesey, 500, 507. Lord *Mansfield* said, in *Hogan*

Michell v. Michell,³ it is said that the word "effects," used *simpliciter, will carry the whole personal estate, as a gift of *102 "all my effects," without more. But it is frequently used in a restricted sense, meaning "goods and movables," as in the common expression of "furniture and effects." It is here intimated that the particular sense is to be gathered from the context. In *Campbell v. Prescott*,² the word "whatever" was added to the word "effects," and this was held to exclude the restricted sense; and in *Michell v. Michell*,³ the addition of the words "that he

v. Jackson, Cowp. 299, 304, "I take *effects* to be synonymous to *worldly substance*, which means whatever can be turned to value; and therefore, that real and personal effects mean all a man's property."

³ 5 Madd. 69, 71. The cases showing the general purport of the terms "goods, chattels, and effects," when used in a general and unlimited sense, are very numerous, and so uniform in their character as scarcely to require enumeration here in any detailed form. In *Cook v. Oakley*, 1 P. Wms. 302, where a sailor, on shipboard, who without his own knowledge was in fact entitled to part of a considerable leasehold estate, in right of his father, made his will at sea, and devised to his mother (if living) his rings, buttons, and chest of clothes, and to his loving friend G. (who was on board with him) his red box, arrack, and *all things not before bequeathed*, and made him his executor, it was held, that this did not pass the leasehold estate, but should be restrained to things ejusdem generis. But this case can scarcely be regarded as of much authority, since it seems to have been decided a good deal upon the consideration that the testator was not aware of the extent of his property at the time of making his will, which would seem to be a very poor reason for restricting the operation of a residuary clause under the possible apprehension that had he known fully how much estate would pass under the general words he might have qualified them. This is always true of a residuary clause made many years before the testator's death. See *Portman v. Willis*, Cro. Eliz. 386. It is rather attempting to make such a will as the testator probably would have made, or might have made, under other circumstances, than giving a legal construction to the one he did in fact make. And the same remark holds true, not only of the early cases upon this subject, but of many others. They are made to conform to some conjectural theory of the testator's probable intention, or rather presumable intention, had he understood himself fully, and not to the legal construction of the words used. This is true, to a considerable extent, of the early cases, in all countries. They seem to go more upon some indefinite apprehension of what the testator would now desire the court to do, than upon the fair construction of what he directed to be done. The following cases may be consulted as bearing upon the question of the construction of these general words in bequests of personalty: *Ryall v. Rolle*, 1 Atk. 165; *Crichton v. Symes*, 3 Atk. 61; *Anon.*, 1 P. Wms. 267; *Moore v. Moore*, 1 Br. C. C. 127, 128; *Kendall v. Kendall*, 4 Russ. 360; *Co. Litt.* 118 a; *Gower*

shall die possessed of" was held to have the same effect. And a bequest, after certain specific gifts of goods to different persons, of "all my other effects to be sold for the benefit" of the legatee, was held to carry the residue of the testator's estate, including "money in the funds."⁴

3. Notwithstanding the general operation of this rule, there have been many cases which, upon grounds more or less satisfactory, have been treated as forming exceptions to it. The exceptional class, which will be found to embrace probably the greatest number of cases, is that resting upon a specific enumeration of articles, followed by general words, sufficiently comprehensive to include the entire residue of the estate, but which nevertheless have, upon various grounds, been restricted to articles ejusdem generis. Thus although the words "goods, chattels, and effects," may frequently be considered as having been used in a restricted sense by *103 * the testator, this of itself will not be sufficient to restrain their general operation, as before stated, unless they can be brought within some general rule of restraining their import, or

v. Gower, Amb. 612; s. c. 2 Ed. 201; *Tilley v. Simpson*, 2 T. R. 659, n.; *Boon v. Cornforth*, 2 Ves. Sen. 277; 1 Jarman (ed. 1861), 715; 2 Wms. Exrs. (Am. ed.) 1060; *Wrench v. Jutting*, 3 Beav. 521; *Collier v. Squire*, 3 Russ. 467. If we correctly understand the comment of the Master of the Rolls upon the words of the will in this case, it presents an instance of surprising misapprehension upon a very simple question. The words of the will are, after certain specific classes of goods, "every other article belonging to me, both in and out of my house, and which may not be mentioned herein;" upon which the Master of the Rolls said: "The articles mentioned were household furniture, plate, china, books, and linen, and he could scarcely say of stock, that it *might* not be mentioned or included in the articles specified." And Mr. Jarman (1 vol. 716) refers to these words as containing the unanswerable reason for the decision. But the words of the will, "which may not be mentioned herein," have no reference to any *doubt* in the mind of the testator whether the residuum of articles, or property, intended by him to pass under the general words, had any likeness to what he had before enumerated or not. It was only adopting the ordinary formula of a residuary clause in a will, "all my other estate, not hereinbefore specified, or which may not be mentioned herein."

⁴ *Hearne v. Wigginton*, Madd. & Geld. 119. And where a will, made in favor of one person only, after bequeathing her certain specified articles of property, added, "and all other chattels," these last words were held to cover the general residue. *Sharman In re*, L. R. 1 P. & D. 661. See also *Cadge*, In re, id. 543. See also *Carr v. Dings*, 58 Mo. 400.

unless the context shows clearly an intention to use them, in the particular instance, in a restricted signification.⁵

(1.) Thus where the bequest is confined to a particular locality, as of all goods and chattels in a particular house. This has been held to include money and bank-notes, but not bonds, promissory notes, and other choses in action, since these have no proper locality, unless for purposes of granting administration, or for some other special purpose, where they, by construction, take the locality of the domicile of the owner.⁶ And a bequest of "all my goods, furniture, plate, books, pictures, and every thing else which at my decease shall be at my house," was held only to include things of the same kind as enumerated, and proper to go with the house, as heirlooms, fixtures, ornaments, and furniture.⁷ And in a comparatively late case,⁸ where the testatrix bequeathed to her

⁵ *Parker v. Marchant*, 1 Y. & C., C. C. 290.

⁶ *Chapman v. Hart*, 1 Vesey, Sen. 271. Lord *Hardwicke* here thought there was a difference in this respect between a legacy of goods aboard a ship, and in a house; as in the latter case the goods will not pass unless in the house at the time of the testator's death, and in the former the bequest is made to carry the goods then in the ship, subject to the common contingencies of navigation, one of which is not uncommon,—the removal of the goods to another ship, or place of security.

⁷ *Boon v. Cornforth*, 2 Vesey, Sen. 277. But in another portion of the will defining the same legacy, the words "plate, linen, and every thing else as her occasion shall require," were held to include provisions for man or beast there.

⁸ *Brooke v. Turner*, 7 Sim. 671. The learned judge here excludes country bank-notes, on the ground that they are to be regarded as choses in action, the same as promissory notes; but we apprehend, in this country, where they are in use as a quasi circulating medium, the same as Bank of England notes in that country, that they would be held to pass as money in possession. This experienced judge, Vice-Chancellor *Shadwell*, very justly says, "I cannot but conjecture, from the whole tenor of this will, that, if the testatrix had been informed that there was any doubt as to the effect of those words, she would have used such language as would have passed all the property which is now the subject of discussion." But after declaring the necessity of giving a construction to the words used by the testatrix, he concludes that "securities for money cannot, in a court of law, be said to be property in a particular place." And Lord *Hardwicke* held, in *Lady Aylesbury's* case, cited, 1 Vesey, Sen. 273, which was a bequest, according to Lord *Eldon*, in *Stuart v. The Marquis of Bute*, 11 Vesey, 657, 662, of "my house and all that shall be in it at my death," that cash and bank-notes passed, his lordship regarding Bank of England notes as cash; in regard to which Lord *Eldon* says, "I do not know why." But in this country it has been held, that under a bequest to the testator's wife of all the residue of the moneys belonging to the estate, bank-notes, when

* 104 niece * her pictures and collection of coins (except those of the two last and present kings) in and about her dwelling-house, and all the residue of her estate, both real and personal, she gave to her grandchildren, and directed that, after her interment, all the property over which she had any disposing power, in and about her dwelling-house, should belong to her niece, and, after the testator's death, guineas, sovereigns, Bank of England, country bank, and promissory notes, and a mortgage, to a large amount in the whole, were found in her house, it was held that the niece, notwithstanding an annuity and a sum in gross were given to her by the will, was entitled to the guineas and sovereigns, and also to the Bank of England notes, but not to the country bank or promissory notes, or the mortgage.

(2.) This subject was discussed in a late case⁹ by a very learned and experienced judge, Vice-Chancellor *Wood*, where it was held, that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other goods, chattels, and effects, which shall be in, upon, or about my dwelling-house and premises at the time of my decease," did not include a sum of money found in the house. The learned judge here attempts to classify the cases, and finally concludes, that general words are not to be restricted to things ejusdem generis, unless it can be done without producing an intestacy as to a portion of the estate, which can only be done where there is some other residuary clause in the will, or some other words of sufficiently extensive signification to carry the property in question, and, in addition, the court can be able to define what species of goods the bequest shall embrace.¹⁰ And

they are known and used as cash, or money deposited in the bank for safe-keeping, will pass, but not promissory notes, bonds, and mortgages, or other securities. *Mann v. Mann*, 1 Johns. Ch. 231. "All the money which shall be left at my decease" was held to pass money due on promissory notes. *Morton v. Perry*, 1 Met. 446. But see *Roberts v. Kuffin*, 2 Atk. 113. But in *Rhodes v. Rhodes*, 22 W. R. 835, a balance on the testatrix's bank account was held not to be money, but a debt due.

⁹ *Gibbs v. Lawrence*, 7 Jur. n. s. 137.

¹⁰ The learned judge here refers to a case before Lord *Cottenham*, where the words were, "wines and property in England," where his lordship went upon the extent of the word "property," which he thought had never been so restricted as the word "effects." *Arnold v. Arnold*, 2 My. & K. 365, 372, 373. In a late English case, *Goods of Cadge*, Law R. 1 P. & D. 543, the words "what is left, my books, furniture, and all other things," were held a sufficient description of the residue. In another case before the present Lord Chancel-

in a * still later case,¹¹ before Sir *John Romilly*, M. R., * 105 it was decided that the words “also the whole of my prop-

lor, then Vice-Chancellor *Wood*, *Dobson v. Bowness*, Law Rep. 5 Eq. 404, the words of the bequest were, “I give, &c., all the rest of my household furniture, books, linen, and china, except as hereinafter mentioned, goods, chattels, estates, and effects, of what nature or kind soever, or wheresoever the same shall be at the time of my death,” to trustees, to pay debts and legacies, and the residue to A. and B. Then followed bequests of ready money, proceeds of sale of specified land, securities for moneys, and all sums due the testator at his decease. The testator was at the date of the will, and at his decease, seised of certain freehold estate, not mentioned in his will. It was held this passed by the words “all the rest of my estate.” This case adopts the views maintained in *O’Toole v. Browne*, 3 E. & B. 572, and *Sanderson v. Dobson*, 7 C. B. 81, but disapproves of the case of *Sanderson v. Dobson*, 1 Exch. 141.

¹¹ *Gover v. Davis*, 7 Jur. N. S. 399. It is observable in this case that the enumeration following the general words is under a *videlicet*, thus indicating an intention to define more specifically what was intended to pass. And the learned judge here refers to the case of *Timewell v. Perkins*, 2 Atk. 102, as showing, what is true, indeed, most of the cases where general words have been restricted to things *ejusdem generis*, that whether the particular words precede or follow those more general, they will only have the effect of restricting their operation to things of the same kind with the specific enumeration, where “the enumeration of the particular articles is intended to be explanatory of the general words, and not merely to show the extent of the gift.” It is here very justly said: “I cannot enter into the question whether he was aware that he possessed property to the value of £2,000 or £3,000. I have only to consider whether the words are large enough to admit the whole of the testator’s property.” See also *Trafford v. Berrige*, 1 Eq. Cas. Ab. 201, pl. 14, where the bequest was of all testator’s goods, chattels, household stuff, furniture, and other things which were then or should be in his house at the time of his death, and it was held that, by the use of the words “other things,” the import of the preceding general words was so restricted, as not to include money in the house. And in *Anonymous*, Prec. in Ch. 8, where the testator gave his wife £1,200 in money, and all the goods and chattels, plate, jewels, and household stuff, and stock upon the ground, *in* and belonging to his house in N., in which there was £400 in money, it was held not to pass by the bequest. The reason assigned for the decree is more absurd, if possible, than the decision itself, that the £400 is a considerable sum, and the testator “cannot be supposed to be misconusant of its being in the house,” and had he intended it to pass by the will, “he would not have couched it under the general words of his goods and chattels, but would at first have given her £1,600.” Such and similar reasoning prevails, with some exceptions, in all the early cases upon wills, which must wholly destroy all just weight attached to the decisions, except as they have been recognized in later cases. See also *Sanders v. Earle*, 2 Ch. Rep. (98), 188. The reason above assigned why money

* 106 erty and effects," * although preceded and followed by specific enumeration of articles, did pass the reversionary interest in a large amount of bank-stock.

in the house should not pass under general words, viz., that the testator must be presumed cognizant of its existence there, would seem to be the best of all reasons why it should pass. And whether he knew it or not, if the money was at the decease of the testator in a condition to come within the just import of the words of the will, upon the established canons of modern construction, of giving the words of a written instrument their natural force and import, it would undoubtedly pass. The elaborate case of *Swinfen v. Swinfen*, 7 Jur. n. s. 89, s. c. 9 W. R. 175, fully recognizes this rule, as clearly established. It has been held that a direction in the will that "all my property, consisting of lands," &c., giving an extended enumeration, and requiring the sale at public auction, and making disposition of the avails, did not dispose of the avails of stock directed in a subsequent portion of the will to be sold, but ordering no disposition of the proceeds, and that they must be regarded as intestate estate belonging to the next of kin. *Fraser v. Alexander*, 2 Dev. Eq. 348. A bequest of all my household furniture, wearing apparel, and "all the rest and residue of my personal property," will pass the whole residue of the estate. *Browne v. Cogswell*, 5 Allen, 556. Bequest for all the residue of the testator's worldly substance, enumerating bedding, china, &c., and all money in bank, and all claims and demands that the testator might have of whatever nature, the testator having specifically bequeathed certain bank stock and money to other persons, was held not to embrace other bank stock of the testator. *Delamater's Estate*, 1 Whart. 362. Sed quære. "Residue of property" held to embrace choses in action. *Scales v. Scales*, 6 Jones, Eq. 163. "Goods and movables" may embrace bonds or money. *Jackson v. Robinson*, 1 Yeates, 101. But wearing apparel, household furniture, plate, linen, books, and every movable, held not to embrace debts due the testator. *Jackson v. Vandersprengle*, 2 Dall. 142. "Rents in arrear on the wife's real estate," held by the court, by the aid of certain written memoranda left by the testator, to embrace not only rents due at his decease, but also money collected for rents and set aside by these memoranda for his wife. *Wadsworth v. Ruggles*, 6 Pick. 63. But this case can scarcely be regarded as sound. *Jones v. Sefton*, 4 Vesey, 166. "All the money" held to embrace money deposited in the savings bank. *Dabney v. Cottrell*, 9 Gratt. 572. Real estate unappropriated goes to the heir, and not to the residuary legatee. *Berry v. Usher*, 11 Vesey, 87; *Robinson v. Taylor*, 2 Br. C. C. 589; s. c. 1 Vesey, Jr. 44; *Halliday v. Hudson*, 3 Vesey, 210. "All my effects" will not embrace copyholds. *Wilson v. Major*, 11 Vesey, 205. And a direction to sell real estate will not be such a conversion as to make it pass under the residuary clauses, but it will go to the heir, so far as unexpended. *Maugham v. Mason*, 1 Ves. & B. 410; *Sheddon v. Goodrich*, 8 Vesey, 481. But the direction in the will may be such as to pass the avails of the real estate to the residuary legatee, and this will be always so when the conversion is out and out, as it is called. *Mallabar v. Mallabar*, Cas. t. Talb. 79; *Brown v. Bigg*, 7 Vesey,

* (3.) There will often occur some circumstance, in the * 107 direction of the will, in regard to the time or the mode of expending a contemplated residuum, which will enable the court to determine, with reasonable certainty, the extent of estate intended to be included in such residuum. Thus, where an officer in the English army, under orders at Cape Town to return to England, after bequeathing small legacies, and directing that certain articles should be sent home to his father, “begged that the remainder of

280; *Ward v. Arch*, 10 Jur. 977; 15 Sim. 389; *Green v. Jackson*, 5 Russ. 35; s. c. 2 Russ. & My. 238; *Kennell v. Abbott*, 4 Vesey, 802. But the general rule is as stated above. *Emblin v. Freeman*, Prec. in Ch. 541; *Cruse v. Barley*, 3 P. Wms. 20; *Gravenor v. Hallum*, Amb. 643; *Collins v. Wakeman*, 2 Vesey, Jr. 683; *Ackroyd v. Smithson*, 1 Br. C. C. 503. The general residuary clause may embrace money appointed by the testator to the same person in trust, without naming the object of such trust, and thus supply that defect. *Goodere v. Lloyd*, 3 Sim. 538. Where personalty is expressly, or by construction, excepted from the residuary clause, and not otherwise disposed of, it must go to the next of kin. *Davers v. Dewes*, 3 P. Wms. 40; *Ray v. Adams*, 3 My. & K. 237. “Household goods” embrace plate. *Flay v. Flay*, 2 Freem. 64; *Snelson v. Corbet*, 3 Atk. 370. “Household furniture” includes fixtures in a leasehold house belonging to the testator. *Paton v. Sheppard*, 10 Sim. 186. “All personal estate and stock upon a farm” will include growing crops. *West v. Moore*, 8 East, 339; *Cox v. Godsalve*, 6 East, 604 and notes. But “farming stock” held not to include growing crops. *Vaisey v. Reynolds*, 5 Russ. 12. “Securities” will pass the debt due upon a mortgage and the legal estate. *Mather v. Thomas*, 10 Bing. 44; *Renveoize v. Cooper*, Madd. & Geld. 371. But see contra, as to the legal estate. *Galliers v. Moss*, 9 B. & C. 267. See also *Field’s Mortgagee*, 9 Hare, 414. Where a sum is appropriated to annuities, and it is provided that as the annuitants die their annuities shall sink into the personal estate, and also that, if the estate shall not produce sufficient for all the annuities, they shall be reduced ratably, which proved to be the fact, and the annuities were reduced accordingly, it was nevertheless held, that as the annuities failed they should go for the benefit of the residuary legatee, and not go to raise the other annuities to the sum named in the will. *Farmer v. Mills*, 4 Russ. 86; *Scott v. Salmond*, 1 My. & K. 363; *Dudman v. Shirreff*, 18 W. R. 596.

On a bequest of personal estate to trustees to convert the same into money, and after paying debts, &c., to pay the income annually to plaintiff, he will be entitled to the income arising on the fund before conversion. *Wrey v. Smith*, 14 Sim. 202. But see *Benn v. Dixon*, 10 Sim. 636; *Hinves v. Hinves*, 3 Hare, 609; *Vaughan v. Buck*, 1 Phil. C. C. 75. Where certain stocks are excepted from the residuary bequest and given to another, and are subsequently converted into money during the life of the testator, such money will go into the residue. *Wingfield v. Newton*, 2 Coll. C. C. 520 and note. But see *Simms v. Garrot*, 1 Dev. & Batt. Eq. 393.

his money and effects might be expended in purchasing a suitable present for his godson," who was the defendant in the suit, and the son of the paymaster of the regiment, and, the testator's debts and legacies having been paid, there remained in the hands of the paymaster £11, which he retained for the purpose of purchasing

* 108 a * present for his son, and it appearing that the testator was entitled to the reversion of sums in stocks expectant upon the death of his father and mother, both of whom were living at the time of his decease, it was held that such reversionary interests did not pass under the general bequest of the remainder of his goods and effects, to purchase a suitable gift for his godson.¹²

(4.) There is a class of cases, of which *Crichton v. Symes*¹³ is one, where the courts seem to infer that a bequest, in general terms, of all the testator's goods, which it is here declared will in general carry the entire residuum of the estate, cannot have that effect, if particular portions of the estate are subsequently given to other persons.¹⁴ And it would seem that where the general bequest is followed by particular legacies to the same person, there is more ground to conjecture that the testator might not have intended, by the prior general words, to give the entire residue of the estate, but it is scarcely more than a conjecture.¹⁵

¹² *Borton v. Dunbar*, 6 Jur. n. s. 1128; s. c. 9 W. R. 41. The Chancellor, Lord Campbell, here places considerable stress upon the fact, that this bequest was expected to be expended in a particular mode, and in a reasonable time after the decease of the testator, which could not, with any propriety, be required to wait upon the coming in of a reversion dependent upon the termination of two lives.

¹³ 3 Atk. 61.

¹⁴ 1 Jarman (ed. 1861), 716.

¹⁵ *Rawlings v. Jennings*, 13 Vesey, 39. Sir William Grant, M. R., here seems to place great stress in favor of the restriction, upon the fact that, after the use of general words sufficient to convey the entire residue of the personal estate, the testator gave particular legacies to the same legatee, which, we venture to suggest, is, at the very least, a very inconclusive reason, since it is not uncommon for the testator to begin his will by making provision for some particular person as his general residuary legatee, and subsequently to make particular legacies to other persons, and sometimes to the same person. But this and all similar arguments are inconclusive. And although, in such cases, it is more common to except from the operation of such residuary clause, in whatever part of the will it appears, all portions of the estate hereinbefore or hereafter disposed of, such an exception is wholly unnecessary, and would be very likely to be omitted by one who comprehended precisely

(5.) And it is obvious, that both these grounds of inference are *entirely unsatisfactory; since the testator may * 109 have accidentally omitted some one whom he intended to remember in his will, until after the insertion of the residuary clause; or he may have chosen to begin his will by naming the residuary legatee; or he may, after giving particular legacies and naming one of his particular legatees as the residuary legatee, have deemed it proper to provide against the possible contingency of there being no residuum of his estate left, by giving particular legacies also to the residuary legatee by which he would be enabled to come in, *pari passu*, with the other legatees, in the event of a deficiency in the estate to meet all claims.¹⁶ Thus, in *Leighton v. Bailie*,¹⁷ the testatrix indorsed upon one of her testamentary papers, "I think there will be something left, after funeral-expenses, &c., paid, to give to W. B." By another testamentary paper she bequeathed £500 to W. B., and it was held that under the first paper W. B. was the residuary legatee. And in *Parker v. Marchant*,¹⁸ a

how much it was needful to insert, and would consequently feel more confidence in omitting what was unnecessary. And although it is more common to find the residuary clause in wills at the conclusion of the instrument, that is by no means a uniform practice; and for courts of justice to place any controlling stress upon such inconclusive circumstances, tends to bring every thing into doubt and confusion. The case of *Rawlings v. Jennings* is questioned in subsequent cases. *Parker v. Marchant*, 1 Y. & C., C. C. 290, 304.

¹⁶ *Arnold v. Arnold*, 2 My. & K. 365, 372, 373. The reasoning of the learned judge here goes very conclusively to show that there is very little reliance upon the rule which restricts general words, following a particular enumeration, to the same kind of articles, unless there be something in the context clearly indicating such an intention in the mind of the testator.

¹⁷ 3 My. & K. 267.

¹⁸ 1 Y. & C., C. C. 290. This whole subject is here very extensively and lucidly discussed by a very learned equity judge, Sir *J. L. Knight Bruce*, Vice-Chancellor, and many of the former cases reviewed. It is here said that "ready money" comprehends money of the testator in the hands of his banker. The word "other," as connected with a residuary clause in a will, does not have the effect to limit its extent, as where the testator said, "and all other the rest and residue of my personal estate of what nature and kind soever, and wheresoever, I give," &c., and it was held that these words standing alone would constitute a complete residuary bequest. *Martin v. Glover*, 1 Coll. C. C. 269; *Rogers v. Thomas*, 2 Keen, 8.

We have before stated, that a bequest or assignment of what the testator or assignor is now possessed of will not pass future acquired estate. See also

bequest to the testator's wife of "all my jewels, plate, linen, china, carriages, wines, and other goods, chattels, and effects, whatever, as her own goods and chattels for ever," and naming her executor, was held to carry the residuum of the estate. And it is here said, that although the words "goods, chattels, and effects" may frequently be considered as having been used by a testator in a restricted sense, yet, *prima facie*, their import is general, and

* 110 there are good grounds for * considering them as used in a general sense, either where they are not placed in connection with words of locality, or where they follow the enumeration of specific articles, or where there are no expressions in the will showing a doubt in the testator's mind as to the comprehensiveness of the terms used.

(6.) We readily perceive, that where the testator uses general words, capable of comprehending a particular species of property, and immediately thereafter makes a particular bequest of this particular species of property to the same person, it does raise a kind of presumption that the testator might not have understood his former language as including it. But this is by no means certain, since the specific enumeration may have been intended to guard against misconstruction, and, as already suggested, it may have been resorted to for the purpose of guarding against the possible contingency of the residuary legatee being cut down in his portion, by reason of a deficiency of assets.¹⁹ And the same application must be made of all these grounds of restricting such general ex-

Pope v. Whitcombe, 3 Russ. 124; Re Wright's Trusts, 15 Beav. 367; Ivison v. Gassiot, 3 DeG., M. & G. 958; Lewis v. Rogers, 1 C., M. & R. 48.

¹⁹ 1 Jarman, 717; Timewell v. Perkins, 2 Atk. 102, 103; In re Kendall's Trusts, 14 Beav. 608. This is where the testator bequeathed to his mother "all and every thing he died possessed of, namely, money, plate, books," and other enumerated articles, for her sole use. "And lest there be any dispute, he declared again that he left her every thing he died possessed of, for her sole use, as above stated." It was held that the whole residue passed, and that the bequest was not restricted to the enumerated articles and others ejusdem generis.

The Master of the Rolls, Sir John Romilly, said: "As a general rule, I should consider that where a testator expresses that he gives to A. every thing he dies possessed of, and afterwards enumerates what it is that he intends to give, the bequest would be confined to the specific enumeration." This, as it seems to us, brings this class of exceptions to one very intelligible point, and almost the only one to be extracted from the cases. How extensive its application may be, is more questionable, perhaps.

pressions within narrower limits. They may help to aid a doubtful construction, but in themselves alone are scarcely reliable, as a sole ground of diverting the words of the bequest from their natural and obvious import. Hence it has been more generally held, especially in the more recent cases, that something more is requisite for that purpose than the mere enumeration of certain specific kinds of estate to go to the same legatee, whether it precede or follow the general bequest. Thus, where the testator gave "all the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever, — canal shares, plate, linen, china, and furniture," — it was held to carry the entire residuary personal estate,* and not to be limited to things ejusdem generis * 111 with those specified.²⁰ The learned judge said, with reference to the cases cited as tending to favor a limited construction of the general words, being followed by a specific enumeration: "I think those authorities do not affect or touch the case before me." The words of the "enumeration are not words of restriction."²¹ They are rather words of enlargement. . . . Such an enumeration, under a videlicet, a much more restrictive expression, has been held only a definitive enumeration, not a restriction to the specific articles."²¹

(7.) It seems to have been determined, that whenever legacies are given payable out of the estate, the gift of the "residue of the money" will include all the personal estate.²² In one of the earlier cases, where the testatrix gave sums of money out of her estate, "and whatever remained of moneys" to the children of the testatrix's relative, at the conclusion of her will, she having given particular legacies to the father and each of the children in the body of the will, it was held to carry the general residuary personal estate.²³ And in another case,²⁴ where the testator directed

²⁰ *Fisher v. Hepburn*, 14 Beav. 626.

²¹ *Bridges v. Bridges*, 8 Vin. Ab. Devise, O. b. pl. 13.

²² *Cowling v. Cowling*, 26 Beav. 449. And where the testator directed the income arising from his principal money to be paid to his wife, for the support of herself and the education of his children, and, upon her decease or marriage, to be divided among them, this was held to embrace all the personal property, there being no other disposition of it. *Prichard v. Prichard*, L. R. 11 Eq. 232. And the same construction has been given the word "money" in this country. *The Estate of Miller*, 48 Calf. 165.

²³ *Dowson v. Gaskoin*, 2 Keen, 14.

²⁴ *Waite v. Combes*, 5 DeG. & S. 676. The word "money," in a strict

* 112 his * executors “to take and receive all moneys that might be in his possession or due to him at the time of his de-

sense, will not include even public stocks. *Gosden v. Dotterill*, 1 My. & K. 56; *Lowe v. Thomas*, 5 DeG., M. & G. 315; s. c. *Kay*, 369. The word “money” is often used, popularly, as equivalent to property, and accordingly has received a similar construction in some of the cases upon wills. Mr. Jarman (vol. i. 730, n.) regards the word “money” in its strict sense, as including bank-notes (*Downing v. Townsend*, Amb. 280) and exchequer bills, and other securities passing as the representative of money. So, also, it may include bills of exchange indorsed blank. *Collins v. Martin*, 1 B. & P. 648, 651; *Wookey v. Pole*, 4 B. & Ald. 1. And in *Shelmer’s case*, Gilb. Eq. 200, money was held to comprise mortgage securities. But, as we have before stated, money in a particular place will not embrace choses in action or securities for money. *Popham v. Lady Aylesbury*, Amb. 68; *Brooke v. Turner*, 7 Sim. 671; *Marquis of Hertford v. Lord Lowther*, 7 Beav. 1; 1 Jarman, 730, n. Cash and ready money are terms of still more limited extent. In *re Powell’s Trust*, Johns. (Eng. Ch.) 49; *Manning v. Purcell*, 7 DeG., M. & G. 55. But, as before stated, it will include money of the testator in the hands of his banker. *Parker v. Marchant*, 1 Y. & C., C. C. 290. And such a balance of cash on a banker’s account will pass under a bequest of debts due the testator. *Carr v. Carr*, 1 Mer. 541, n. And a bequest of “any small sum remaining in the bank” was held to carry all which remained there at the decease of testatrix, although exceeding £1,000. *Page v. Young*, 23 W. R. 479; L. R. 19 Eq. 501. But a revocation of all “moneys bequeathed” was held to extend to stock legacies. *Barclay v. Maskelyne*, 5 Jur. n. s. 12; s. c. Johns. (Eng. Ch.) 124. Securities for money will include bills, notes, mortgages, stock in the funds, railway debentures (which is what we call railway bonds), policies on life, but not shares in joint-stock companies. But in *Hopkins v. Abbott*, L. R. 19 Eq. 222, *Malin*, V. C., held, upon the decided cases, contrary to his own acknowledged convictions of the intent of the testator, that bankers’ deposit notes were not embraced under the terms “all bonds, promissory notes, and other securities for money.” Nothing could seem more absurd on the face of it. Any number of erroneous decisions ought to give place to the truth; but it is not possible to follow any such course in an inferior court. The matter can only be set right in the court of last resort. But such a rule would have no force in an American court as an English decision. The decision, whether made in an inferior court or that of last resort, must go here for its true value, as an evidence of truth, since no decisions out of the state where made have any absolute authority, but only operate by way of aid in reaching the truth. 1 Jarman, 731; *Dicks v. Lambert*, 4 Vesey, 725; *Bescoby v. Pack*, 1 Sim. & Stu. 500. The funds, or the public funds, generally, mean government stock of the country; and “foreign funds” has been held to import the stocks of foreign governments. *Ellis v. Eden*, 23 Beav. 543. But “funds” will not include bank-stock. *Slingsby v. Grainger*, 7 Ho. Lds. Cas. 273; s. c. 5 Jur. n. s. 1111. Nor East India stock. *Brown*

cease," and invest it for his wife for life, it was held, that, there being no other mode of giving effect to the word "moneys," it must be regarded as equivalent to a gift of the general personal estate.

(8.) And where the testatrix revoked a residuary bequest, as to plate, linen, household goods, and other effects (money excepted), it was held that, by excepting money from "other effects," she had manifested such an intention to use the words in a more extended sense than that of the same class of articles before enumerated, that the court must suppose she used the words in their general and unlimited sense.²⁵ And in *Bennet v. Batchelor*,²⁶ Lord

v. Brown, 4 K. & J. 704. Nor unfunded exchequer bills, unless there is nothing else to which it can more appropriately apply. *Mangin v. Mangin*, 16 Beav. 300.

²⁵ *Hotham v. Sutton*, 15 Vesey, 319. Lord *Eldon*, more than once in the course of this opinion, alludes to the fact that the testatrix, "if she was here, would decide" the questions raised differently from the court. His lordship said: "The doctrine appears now to be settled in this court, that the words 'other effects,' in general, mean effects ejusdem generis;" but at the same time saying it was not the sense in which the testatrix had used them in this case, as already stated in the text. It does seem rather humiliating to cling with such tenacity to general rules of construction, which confessedly lead us, in the very instance, one side of the obvious import of the words used, in the mind of the testator. It would seem wiser and better to allow such latitude of construction, that where general rules clearly led us one side of the testator's intent, we could give them such qualification as was requisite to reach the testator's clearly expressed purpose. This idea is well expressed by a distinguished equity judge, Sir *John Romilly*, M. R., in *Cowling v. Cowling*, 26 Beav. 449, 453: "I doubt very much whether any rule can be laid down. It would seem difficult to justify this conclusion,—that if *sufficient be found in a will* to show that the testator intended the stock to pass, still that the words should not be sufficient to effectuate that intention without explanatory context." In what we have said, as to following the clear intent, we do not intend to justify the rule of construction of the words of the will adopted in many of the early English cases, and in perhaps the majority of the early American cases, that the court may disregard all general rules of construction, and allow themselves to be led blindfold in pursuit of some conjectural intent of the testator, gathered from general speculation upon the state and condition of the testator's property and family, as well as from the import of the words used, and often in conflict with the plain import of the language used. But we cannot forbear to say, that, where the intention of the

²⁶ 3 Br. C. C. 28; s. c. 1 Ves. Jr. 63.

* 113 * *Thurlow* construed the use of specific enumeration, in connection with general words sufficient to embrace all the things enumerated, as intended to give more perspicuity to the bequest, and to avoid all possible misconstruction.²⁶ And there are many other cases which seem to favor giving general words, used in connection with a specific enumeration of articles, their natural force and import.²⁷

(9.) The learned author of the treatise on Wills²⁸ thus sums up the result of his review of the cases upon this point: "These cases indicate the disposition of the judges of the present day to adhere to the sound rule which gives to words of a comprehensive import their full extent of operation, unless some very distinct ground can be collected from the context for considering them as used in a special and restricted sense." And one of the most common grounds of inferring the limited signification of general terms, which might, in their more enlarged sense, include the general residue of the estate or of the personal property, is, that, in some other portion of the instrument, a clearly defined residuary clause is found, which, as no testator would designedly create two residuary legatees, must very clearly show that one or the other was not so intended. As in the case²⁹ of a bequest of all my house-

* 114 hold * goods, and other goods, plate, and stock, within doors and without, and a further bequest to another person of the residue of the personal estate: The question was, whether the testator's ready money, cash, and bonds should pass by the first

testator is made clear, by the terms of the will, with reference to the subject-matter, courts ought not to be required to depart from such intention out of deference to any arbitrary canon of construction. And when they do that, it would surely be a very questionable ground of exultation, that the court were following general rules of law at the expense of the justice of the particular case. That may sometimes be required; but if so, it should, we think, be done with regret rather than boastfully.

²⁷ *Fleming v. Burrows*, 1 Russ. 276; *Sutton v. Sharp*, id. 146; *Kendall v. Kendall*, 4 Russ. 360.

²⁸ 1 Jarman (ed. 1861), 724.

²⁹ *Woolcomb v. Woolcomb*, 3 P. Wms. 112. And in the case of *Lamphier v. Despard*, 2 Dru. & War. 59, upon a bequest of "all his household furniture, plate, linen, and all other chattel property that he might die seised or possessed of," with a subsequent residuary bequest, Lord *St. Leonards*, then Chancellor of Ireland, held, that the first bequest must be restricted to chattel property ejusdem generis.

bequest; and it was held that they did not, for then the bequest of the residue would become inoperative.

(10.) And there are cases where terms, even less comprehensive than those which we have been considering, have, from their relation, been held to carry the entire residue of the estate. Thus, a bequest of "household furniture, goods, ready money, debts, and securities," was held to comprise the whole residuary personal estate.³⁰ Sir *W. Page Wood*, V. C., here said: "'Goods'

³⁰ *Avison v. Simpson*, Johns. (Eng. Ch.) 43. Considerable discussion will be found in the books in regard to the extent of particular words. "Ready money" is one of the terms which has been applied, with some degree of inequality, to different cases. It has been held to embrace money on deposit in a savings bank, after notice requiring payment, it being subject to the order of the testatrix. But sums secured on notes will not pass as ready money. In *re Powell's Trusts*, Johns. (Eng. Ch.) 49. The words "household goods" or "furniture" will include pictures hung up, and plate, and house linen, and china, but not books. *Kelly v. Powlet*, Amb. 605. But the furniture of a particular house will not include plate which the testator carried with him when he removed from one house to another. *Franklyn v. Earl of Burlington*, Prec. in Ch. 251. The Lord Keeper was of opinion that furniture, in a large sense, "takes in plate," but not here, as this plate is no more the furniture of one house than another, being rather ambulant with the person of the testator. Prize-medals, coins, and trinkets, if framed and hung, or otherwise disposed for ornament, will pass as furniture. *Cremorne v. Antrobus*, 5 Russ. 312, 321; 1 *Jarman*, 721, n. So also of current coin, if curious and kept with medals. *Bridgman v. Dove*, 3 Atk. 201. There are many similar cases. Under a bequest of a house, with all the furniture and stock of carriages and horses and other live and dead stock, for life, it was held that plate passed, but that wine and books did not. *Porter v. Tournay*, 3 Vesey, 311. See also *Pratt v. Jackson*, 2 P. Wms. 302; *Birch v. Dawson*, 2 Ad. & Ellis, 37; *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; *Bunn v. Winthrop*, 1 Johns. Ch. 329, 338. Under a bequest of furniture and all other articles of domestic use or ornament, it was held that books in a dwelling-house would pass. *Cornewall v. Cornewall*, 12 Sim. 298, 303. And although this decision has been doubted (1 *Jarman*, 722, and note), it seems to rest upon very satisfactory grounds. "Household furniture and other household effects" will extend to all that is in the house for use, consumption, or ornament, such as pistols, apparatus for turning, models, pictures, organ, parrot, books, wine, and liquors, but not to a pony, or cow, or fowling-piece. 1 *Jarman*, 722. "Movables" unrestrained will comprehend all personalty. *Steignes v. Steignes*, Moseley, 296; 1 *Jarman*, supra. Articles temporarily removed from a house will be treated the same as if remaining there, but not where permanently removed. *Heseltine v. Heseltine*, 3 Madd. 276; *Spencer v. Spencer*, 21 Beav. 548. Or when intended to be carried there, but not in fact removed. *Lord Brooke v. Earl of Warwick*, 2 DeG. & Sm. 425.

* 115 is a very * large and comprehensive word. . . . Out of the things so given all her debts are to be paid. I find no residuary gift, unless it be contained in the clause in question."

4. It seems to be well settled that a residuary bequest as to personal estate carries not only every thing not attempted to be disposed of, but every thing which turns out not to have been effectually disposed of, as void legacies and lapsed legacies. A presumption arises in favor of the residuary legatee, as to personalty, against every other person except the particular legatee. The testator is supposed to give it away from the residuary legatee, only for the sake of the particular legatee.⁸¹

⁸¹ *Cambridge v. Rous*, 8 Vesey, 12, 25; *Leake v. Robinson*, 2 Mer. 363, 393; *Reynolds v. Kortright*, 18 Beav. 417, 427. The learned judge here said: "The result is that every thing which is ill given falls into the residue, . . . for which *Leake v. Robinson* was cited, but for which it is not necessary to cite any case." This rule is thus stated in *King v. Strong*, 9 Paige, 94, by an experienced judge: A general residuary bequest of personal estate, or of chattels real, carries to the residuary legatee not only such estate and such interests therein as the testator did not attempt to dispose of by his will, but also such as by lapse or otherwise have not in fact been effectually disposed of by him. The reporter, himself an experienced and learned lawyer, here refers to the following American cases in support of the foregoing proposition, which he has inserted in the head-note of the case. *Banks v. Phelan*, 4 Barb. Sup. Ct. 80; *King v. Woodhull*, 3 Edw. Ch. 79; *Taylor v. Lucas*, 4 Hawks, 215; *James v. James*, 4 Paige, 115; *Gore v. Stevens*, 1 Dana, 201, 206; *Floyd v. Barker*, 1 Dana, 480; *Frazier v. Frazier*, 2 Leigh, 642; *Trippe v. Frazier*, 4 Har. & J. 446; *Peay v. Barber*, 1 Hill, Ch. (S. C.) 95; *Sinkler v. Sinkler*, 2 Desaus. 127. See also *Roe v. Avis*, 4 T. R. 605; *Church v. Mundy*, 12 Vesey, 426; *Welby v. Welby*, 2 V. & B. 167. And property purchased but not paid for during the life of the testator will pass under the residuary clause, and the payment of the price will be charged upon the personalty. *Ambler v. Macon*, 4 Coll. 605. But a general residuary bequest of all the property the testator might die possessed of may be so restricted in its operation as not to embrace a portion of the estate. *Attorney-General v. Wiltshire*, 16 Sim. 36. And where the residuary legatee is specifically named as the substitute for a particular legatee she will take under this provision of the will, and not under the residuary clauses where that construction seems requisite to effectuate the testator's intentions. *Rose v. Rose*, 17 Vesey, 347. The rule that the heir is entitled to real estate not effectually disposed of, in preference to the residuary devisee, which obtains in England, is maintained in some of the American cases. *Van Kleeck v. The Reformed Dutch Church*, 6 Paige, 600. But in some of the states no distinction is made between real estate and personal, in this respect. *Prescott v. Prescott*, 7 Met. 141; *Blaney v. Blaney*, 1 Cush. 107; *Thayer v. Wellington*, 9 Allen, 283. And as, in most of the states, no dis-

* 5. The courts have for a long time inclined very decid- * 116
edly against adopting any construction of wills which
would result in partial intestacy, unless absolutely forced upon
them. This has been done partly as a rule of policy, perhaps, but
mainly as one calculated to carry into effect the presumed intention
of the testator. For the fact of making a will raises a very strong
presumption against any expectation or desire, on the part of the
testator, of leaving any portion of his estate beyond the operation
of his will. Hence, where a general residuary bequest was ac-
companied with expressions favoring a more limited construction,
and pointing only to a particular surplus, beyond the property spe-
cifically mentioned, it was nevertheless held to pass the residuum
of his property at the time of his decease, as well that which he
held at the date of the will as that afterwards acquired. Lord
Eldon here said that was the general rule in regard to residuary
bequests, to avoid partial intestacy, and that it required very
special words to confine a residuary bequest to the property be-
longing to the testator at the date of his will.³²

inction is made in regard to the disposition of real and personal estate by
will, it may be expected the rule just stated, as to real estate, may soon be
abandoned. The reversion or remainder of an estate devised for life passes
by the general residuary clause. *Cline v. Latimore*, 1 Winst. Law, 207; *Doe d.*
v. Atkins, id. 273.

³² *Attorney-General v. Johnstone*, Amb. 577. In this case, where the resi-
due was given as "the small remainder of my personal estate," and some
query had been expressed whether it would amount to £100, it was held not
to include the lapsed legacies amounting to £20,000. The Chancellor, Lord
Camden, here considered that the testator had limited the residuum to what
should remain above the amount of all the legacies in the will, whether valid
or not, and whether they should have to be paid or not. It was therefore
more in the nature of a particular than of a residuary legacy. And in *Davers*
v. Dewes, 3 P. Wms. 40, where the testator gave the residue of his estate not
before disposed of, or reserved to be disposed of by a codicil, having reserved
the goods and furniture in a particular house to be disposed of in that mode,
but which was never done, it was held that the residuary legatee should not
take the estate thus reserved, since it was specifically excepted from the opera-
tion of the residuary clause, and should therefore go to the next of kin,
according to the statute of distributions. This question is examined in *Evans*
v. Jones, 2 Coll. C. C. 516, where it is held that the special exception of cer-
tain property from the residuary bequest, and giving that to another which
failed by an event analogous to a lapse, will not prevent the excepted property
from going to the residuary legatee. And a similar view is maintained in

* 117 * 6. In *Roberts v. Cooke*,³³ a general residuary disposition of real and personal estate, "not hereinbefore specifically disposed of," was held to comprehend specific legacies lapsed, the word "specifically" being construed "particularly." And where the testator provided for the investment of all his estate in three-per-cent consols, £3,700 already being so invested, and out of the dividends directed his executors to pay one annuity of £20

James v. Irving, 10 Beav. 276. See also *Sheffield v. Lord Orrery*, 3 Atk. 282, 286; *Thompson v. Whitelock*, 4 DeG. & J. 490. And a prior definition of what should constitute a residuum was held not to restrict the operation of the residuary bequest. *Markham v. Ivatt*, 20 Beav. 579. So in other cases, as where the property in question was excepted from the operation of the residuary clause, in order to be given in trust for the benefit of other parties, which failed in consequence of the indefinite manner in which the trust was expressed in the will, it was held to fall to the share of the residuary legatee. *Bernard v. Minshull*, Johns. (Eng. Ch.) 276. Vice-Chancellor *Wood* here said: "All you have to consider is, whether the property is excepted in order to take it away, under all circumstances and for all purposes, from the persons to whom the rest of the property is given, or whether it is excepted merely for the purpose of giving it to somebody else. If the latter, and the gift to somebody else fails, the donees of all except this property are entitled to take the whole." The cases are here very extensively examined, and, among others already referred to, the following not before referred to under this point: *Easum v. Appleford*, 5 My. & Cr. 56, 61, 62; *Doe v. Pearson*, 6 East, 173, 181; *Upjohn v. Upjohn*, 7 Beav. 59; *Circuit v. Perry*, 23 Beav. 275; *Pomfret v. Perring*, 5 DeG., M. & G. 775; *Oke v. Heath*, 1 Ves. Sen. 135; *Page v. Leapingwell*, 18 Vesey, 463. But some cases held otherwise. In the case of *Wainman v. Field*, Kay, 507, the testator made a general bequest to trustees, from which he excepted certain leasehold estates which he declared his intention to exonerate from all charge for the payment of his debts, which he specially charged upon the general fund, the remainder of which constituted the residuary bequest. The leaseholds were given in a manner void for remoteness, and the question was whether they passed to the residuary legatee; and the same learned judge held, that the intention of the testator must be expressly disregarded in reference to exonerating the leaseholds from the trusts of the residuum, if they were allowed to fall into that fund, and therefore held they did not. It was held in *Gowan v. Broughton*, 23 W. R. 332, by Vice-Chancellor *Malins*, that where the residue of the estate is given to two persons as tenants in common, and fails as to one, the portion thus lapsing will go to exonerate the share of the other tenants from contributing to the payment of debts. But the learned judge said the elementary writers have laid down the contrary.

³³ 16 Vesey, 451. See also *Brown v. Higgs*, 4 Vesey, 708; *Maberly v. Strode*, 3 Vesey, 450.

and one of £30, and in a subsequent part of his will gave all his household furniture and all his property of every kind, *not specified above*, to his wife, it was held that the capital producing the annuities passed to his wife, subject to the payment of the annuities.³⁴

* 7. There is an important distinction in principle, and * 118 which is adverted to in many of the cases, between an enumeration of particulars, either preceded or followed by general words, whether the enumeration is by way of limitation, as by a *videlicet*, or other similar form of expression, showing to what the general words were intended to apply, and an enumeration of particulars which is regarded as imperfect, and a mere approximation or specimen of the whole, the general words being intended to embrace every thing coming within the range of their ordinary import. This distinction will be found important to be borne in mind, and it is one very much regarded in the later English cases. As where a British subject, domiciled in Russia, in making his will, first declared that he thereby disposed of all his property, and, after directing his property in Russia converted into money, proceeded to dispose of "the money proceeds of all the above, as also the whole of my capital which shall remain with me, after my death, in ready money, and in bank billets, belonging to me." It was proved that "bank billets" were a species of Russian negotiable securities. It was held that the terms, "*in ready money and bank billets*," restricted the former general words within the limits of the latter terms, and that a considerable portion of

³⁴ *Clowes v. Clowes*, 9 Sim. 403. There is an important distinction already stated, between a void or lapsed bequest of personal estate, and a void or lapsed devise of real estate, which obtains both in England and America. The former falls into the residuum, and the latter goes to the heir. *Cox v. Harris*, 17 Md. 23, 31, citing *Brown v. Higgs*, 4 Vesey, 708, n. b, and cases cited (Sumner's ed.). *Helms v. Franciscus*, 2 Bland (Md. Dec.), 546, 560. See also *Tongue v. Nutwell*, 13 Md. 415. And the heir having taken other lands by devise under the will does not prevent his taking such land as fails to be devised effectually by the testator. This does not present a case where the heir is bound to make an election. *Tongue v. Nutwell*, 17 Md. 212. Courts favor such a construction as to give the real estate to the heir. *Ridgely v. Bond*, 18 Md. 433. But a special bequest of particular estates in a place named to one, and "the rest of my estates" in the same place to another, will not be construed as a residuary bequest. *Springett v. Jenigs*, L. R. 6 Ch. App. 333.

the testator's estate in the English funds did not pass under the will.³⁵

8. But where a portion of the residuary bequest fails to become operative at the death of the testator in the manner provided, the portion thus failing will not go to increase the other portions of the residuum, as a residue of residue.³⁶ The case just referred to³⁶ was where the testator gave his residuary estate equally * 119 * between his two daughters; but in the event of either dying without children, which happened, of the moiety of the one so dying he gave £500 to H., and the remainder to the other sister. The testator revoked the bequest of £500 without making any fresh disposition of it, and it was held that it went to the next of kin, as estate undisposed of. "Residue," said the learned judge, "means all of which no effectual disposition is made

³⁵ *Wylie v. Wylie*, 1 DeG., F. & J. 410; s. c. 6 Jur. n. s. 259.

³⁶ *Skrymsher v. Northcote*, 1 Swanst. 566; s. c. 1 Wils. 248. It seems to us that this case is clearly in violation of the principle that a particular legacy which fails goes to the residuary legatee. But the ground upon which it professes to go, that the failure of a portion of the *residuary* bequest will not go to increase the *balance* of the residuum, however difficult it may be to comprehend the distinction in principle between that rule and the general rule, that all *particular* legacies which fail go to swell the share of the residuary legatee, is nevertheless firmly established by a considerable number of cases. *Simmons v. Rudall*, 1 Sim. n. s. 115; *Mitford v. Reynolds*, 1 Phill. C. C. 185; *Wilkinson v. Atkinson*, Turn. & Russ. 255; *Peat v. Chapman*, 1 Ves. Sen. 542; *Baxter v. Losh*, 14 Beav. 612; *Bagwell v. Dry*, 1 P. Wms. 700; *Ackroyd v. Smithson*, 1 Br. C. C. 503; *Phillips v. Phillips*, 1 My. & K. 649; *Harris v. Davis*, 1 Coll. C. C. 416; *Norman v. Frazer*, 3 Hare, 84; *Trippe v. Frazier*, 4 Har. & J. 446; *Winston v. Webb*, 1 Phillips, Eq. 1; *Hastings v. Earp*, id. 5; *Garthwaite's Ex'rs v. Lewis*, 25 N. J. Eq. 351. And the lapse of a bequest of money arising out of the sale of real estate will go for the benefit of the heirs. *Williams v. Coade*, 10 Vesey, 500; *Salt v. Chattaway*, 3 Beav. 576. See also upon the general proposition, that the failure of a portion of the residuary clause goes to the next of kin as intestate estate, *Sykes v. Sykes*, Law Rep. 3 Ch. App. 301. But *Mitford v. Reynolds*, supra, is similar to *Skrymsher v. Northcote*, supra. And in *Mitford v. Reynolds*, 16 Sim. 105, it is decided that, the bequest for a monument having failed, the amount intended for that purpose will go to the residuary legatee. See also *Lloyd v. Lloyd*, 4 Beav. 231; *Green v. Pertwee*, 5 Hare, 249; *Humble v. Shore*, 7 Hare, 247; *Gibson v. Hale*, 17 Sim. 129. The same rule obtains in the American courts. *Hart v. Marks*, 4 Bradf. Sur. Rep. 161; *McLoskey v. Reid*, id. 334; *Sohier v. Inches*, 12 Gray, 385.

by the will *other than* the residuary clause. In the instance of a residue given in moieties, to hold that one moiety lapsing shall accrue to the other, would be to hold that a gift of a moiety shall eventually carry the whole." And still it is not very apparent how the above reasoning may not apply with equal force to a gift of a residue, after particular legacies, which is really rendered as definite, by deducting the prior legacies, as if it had been expressed, as one-half, or one-eighth, or any other definite proportion of the estate. And to adopt the principle, that, if all the particular legacies lapse, the residuary clause shall carry the whole estate, involves the same departure from the expressed intention of the testator, as where the residuary clause is divided into moieties, and one of them fails, to let it go to the other. But this distinction is based upon a presumed intention of the testator to give his whole estate to the residuary legatee, except as it shall be cut down by the deductions necessary to meet the particular legacies. But in regard to the residuary bequest, where it is divided into distinct portions, no such presumption, as to increasing the several portions by the failure of the others, can so directly arise. And it has been upon this presumed difference of probable intention that the distinction has been made. And having been once established, * upon grounds however uncertain, it should * 120 not now be disregarded, unless upon some satisfactory grounds arising out of the context of the will, or the extrinsic proof of circumstances proper to be received in aid of the construction.

9. There is a class of cases, where the residuary bequest, by reason of the special circumstances of the case,³⁷ has been construed as a particular legacy, not liable to fail, except ratably with the other legacies, on account of any unexpected deficiency of the estate, or to be augmented by the unforeseen failure of the other legacies. But the early cases upon this point seem to have gone a good deal upon the ground of making an escape from what would otherwise become a severe hardship, and have not therefore been well received by the courts or the profession.³⁸ But the cases

³⁷ *Dyose v. Dyose*, 1 P. Wms. 305.

³⁸ The case last cited was where the testator gave £3,000 to each of his younger sons, and the residue to his oldest son. The widow married again, and the step-father squandered the estate, so that, if the younger sons were paid their full legacies, there would remain but a pittance for the oldest son.

upon this point, which seem to be maintainable, rest upon the fact, that the testator has in his will, either in express terms or by reasonable implication, limited the extent of the residuary bequest.³⁹

10. Questions sometimes arise in regard to the extent of the word "residue," as used in a will, whether it was intended to apply to the residue of the whole estate, or only of a particular fund. The courts have manifested a disposition to extend it to the whole estate, when there was no other residuary clause.⁴⁰

Lord *Cowper*, Chancellor, said, "The testator must, at the making of his will, know what his surplus would amount unto; and that he meant this surplus as a legacy to his eldest son." Whereupon the court declared "it ought to be looked upon as such;" which has been regarded as making such a will for the testator as he probably would desire to have made, if he could have been consulted at the time of the decision. The case has not, therefore, been approved. *Fonnereau v. Poyntz*, 1 Br. C. C. 472; *Ex parte Chadwin*, 3 Swanst. 380; *Humphreys v. Humphreys*, 2 Cox, 184; *Page v. Leapingwell*, 18 Vesey, 463.

³⁹ *Page v. Leapingwell*, supra; *Easum v. Appleford*, 5 My. & Cr. 56; *Wright v. Weston*, 26 Beav. 429. And a particular residue will take lapsed legacies belonging to that particular fund, the same as a general residue in ordinary cases. *De Trafford v. Tempest*, 21 Beav. 564. See also *Vivian v. Mortlock*, 21 Beav. 252; *Booth v. Alington*, 6 DeG., M. & G. 613. See *Re Harries' Trust*, Johns. (Eng. Ch.) 199, where the cases are carefully examined by Vice-Chancellor *Wood*, and the general proposition above stated maintained. See *Wilkinson v. Schneider*, L. R. 9 Eq. 423.

⁴⁰ *Boys v. Morgan*, 3 My. & Cr. 661. In *Crooke v. De Vandes*, 9 Vesey, 197, a doubtful bequest of the residue was held to extend to the residue of the whole estate. The testator directed his executors to invest the surplus of his estate, after the payment of some particular legacies, and out of the income to pay certain annuities; and "all the remaining interest to be equally divided and paid yearly to my two grandsons or their children," &c., and it was held to extend to the fund as well as the income. The Lord Chancellor, *Eldon*, here said: "The safest course is to abide by the words, unless upon the whole will there is something, amounting almost to demonstration, that the plain meaning of the words is not the meaning of the testator." This is undoubtedly a good definition of the exact ground of departure from the primary meaning of the words of the will. See s. c. 11 Vesey, 330. But see *Wilson v. Wilson*, 11 Jur. 793, 794; 1 DeG. & Sm. 152; *Holford v. Wood*, 4 Vesey, 76; *Wilde v. Holtzmeier*, 5 Vesey, 811; *Attorney-General v. Goulding*, 2 Br. C. C. 428, where general terms receive a more limited construction. Under the present English statute a general residuary clause will carry after-acquired real estate. *Cox v. Bennett*, L. R. 6 Eq. 422. So also where the testator had specially devised his real estate, and then made a residuary clause in trust embracing all his other property, it was held to carry after-acquired real estate. The court here rely chiefly upon the absence of the words "executors

* 11. We have already adverted to some cases where the * 121 courts have, by construction, corrected obvious miscalculations of the testator, apparent upon the face of the will.⁴¹ There are many others of the same character, from which it may be safely declared, that any mistake, apparent upon the face of the will, in such * form as to leave no reasonable doubt of * 122 the testator's intention, and especially where it is the result of miscalculation of figures, whereby the amount of a legacy is stated differently from what the accomplishment of the testator's declared intention required, will be corrected by way of construction. As where the testator, after writing inaccurately the amount of his wife's annual income, making it £1,560, directed his trustees to add an annuity of £440, so as to raise it to £2,000, it was held that she was entitled to have it made up to that amount at all events, and without reference to the amount required to effect it.⁴² And a similar rule has been adopted in other cases.⁴³ And where the testator gave a legatee "£500, in addition to £1,500

and administrators," and the use of the words "devise and bequeath" and "income of residuary estate." *Lloyd v. Lloyd*, 17 W. R. 702; s. c. Law Rep. 7 Eq. 458. Where the testator had given legacies to certain persons, as his nephews and nieces, some of whom were his wife's nephews and nieces, and then gave his residuary estate to his nephews and nieces, it was held to embrace those of his wife before named. *Adney v. Greatrex*, 17 W. R. 637. So, too, in one case upon a residuary bequest of all the testator's personal estate and effects, it was held, by reference to the other parts of the will, that the residuary real estate passed. *Lines v. Lines*, 17 W. R. 1004. But in another case, *Ex parte Yates*, id. 872, the words personal effects and properties of every description were held not to include the testator's realty, and the latter seems the more just construction.

Where the will disposes of certain descriptions of stock and hay, and by a codicil all the property not disposed of by the will is embraced in a residuary clause, it was held that property of the same kind disposed of by the will, but acquired after its execution, passed under the will and under the codicil. *Moore v. Madden, Jr.* Law Rep. 2 Eq. 511. Where the bequest was of "all the stock of the Governor and Company of the Bank of Ireland to which I may be entitled at my decease," and the testator had no such stock standing in his own name, but there was £1,000 standing in the name of a deceased son to whom the testator was heir, it was held not to pass. But one would have supposed it might have been held otherwise without any great stretch of construction.

⁴¹ Ante, vol. 1, §§ 83-35.

⁴² *Ouseley v. Anstruther*, 10 Beav. 453; *Read v. Strangways*, 14 Beav. 139.

⁴³ *Trevor v. Trevor*, 5 Russ. 24.

which I have before bequeathed to him," when in fact he had only given him £1,000 before, it was held that the legatee was, by implication, entitled to £2,000 in all.⁴⁴ So also where the will directed the trustees to pay £300 to A., the amount due on bond, and in fact there was but £120 due, it was held that the legatee was entitled to the whole £300.⁴⁵

12. And what one has contracted for he is, in regard to the testamentary disposition of his estate, regarded as possessed of, as his own property. Thus lands contracted for will pass under a general devise of all lands.⁴⁶ And the same rule applies to stocks held by way of mortgage, or any other imperfect or defeasible title, provided they are so far the property of the testator, before
 * 123 * his death, that he was accustomed to deal with them as his own.⁴⁷

13. There are many other terms, of frequent occurrence in legacies, in regard to which there have been almost an infinite number of decisions; but cases generally depend so much upon their peculiar circumstances, and the accompanying context, that

⁴⁴ *Jordan v. Fortescue*, 10 Beav. 259.

⁴⁵ *Whitfield v. Clement*, 1 Mer. 402. In the modern case of *Thompson v. Whitelock*, 4 DeG. & J. 490, to which we have already adverted, a similar question arose, the testator reserving out of the sum given his wife £4,100, of which he gave her only the use during her life, directing the principal to be thereafter divided among his relatives, to whom he had left legacies in the former part of his will, in proportion to such legacies; adding, "which will just make their legacies double the first bequest." But the sum requisite for that purpose was £6,100, and it was held that the intention to double the original legacies was not sufficiently clear to justify the court in holding that £4,100 was written by mistake for £6,100.

⁴⁶ *Atcherley v. Vernon*, 10 Mod. 518. And the general residuary clause in a will disposing of all the rest of the testator's estate will operate as an appointment under a power reserved to the testator in a conveyance made before the date of the will. *Bangs v. Smith*, 98 Mass. 270. But see *Butler v. Gray*, L. R. 5 Ch. App. 26. It is now held to operate upon the legal estate held by the testator or mortgagee. *Stevens's Will*, Law Rep. 6 Eq. 597.

⁴⁷ *Collison v. Girling*, 4 My. & Cr. 63. The Lord Chancellor, *Cottenham*, here puts the illustration of a person having purchased a large quantity of wool, and by his will giving all his personal estate, except his wool, to one, and all his wool to another: his lordship inquired, "Could there be any question as to the title to the wool so contracted for, although the party contracting to sell had it not himself, but had to procure it to enable him to fulfil his contract? . . . What a party is entitled to under a contract, he considers as his own."

one can afford very slight aid towards the determination of another not precisely similar. Thus the word "jewels" is often brought under discussion, as in *Attorney-General v. Harley*,⁴⁸ where the testatrix directed all her jewels to be sold, except certain rings, and her necklaces of every description, pearls, garnets, carnelians, and watches, which she gave specifically; and it was held that a diamond necklace and cross came under the direction for sale, and the pearl necklace passed under the specific bequest.

14. A question arose, under the will of the celebrated Dr. Willis, whether a collection of manuscript notes, in thirty-two uniformly bound volumes, and which contained copies of daily reports of the testator as a physician of his attendance upon George the Third, made to the Queen in Council, passed under a bequest of "all and every my books in and about my house," and it was determined in the affirmative.⁴⁹

15. There is no question but errors in the description of the subject-matter of the bequest may be corrected in the same manner and to the same extent that any other mistakes in written instruments may be set right. And in the description of the subject-matter, as it must of necessity be supposed to have had reference to some portion of the testator's property, there is a much narrower * range of objects from which to select, in the * 124 application of the words to the subject-matter, than in the case of uncertainty in the description of the legatee. And in applying the words of the will to the subject-matter, we must look through the list of testator's estate, and select that portion which is best designated. And in this mode, by the aid of extraneous evidence, which is properly receivable, there will, in general, be very little difficulty in arriving at the testator's intention with reasonable certainty.⁵⁰

⁴⁸ 5 Russ. 173.

⁴⁹ *Willis v. Curtois*, 1 Beav. 189. In this case the testator, having three places of residence, at A., B., and C., bequeathed the one at A. to his nephew; and also "all his carriages, horses, implements, and his live and dead stock and chattels in and about the premises at A., and also his household goods and furniture, pictures, plate, linen, china, liquors of all sorts, &c.;" it was held that the household goods, furniture, &c., at B. and C., passed by the bequest; but whether a bust would pass under the latter words, *quære*.

⁵⁰ 2 Wms. Ex'rs, 1080; Swinb. pt. 7, § 5, pl. 7, where it is said: "The error of the testator in the proper name of the thing bequeathed doth not hurt the validity of the legacy, so that the body or substance of the thing

16. In alluding to some of the American cases upon the questions discussed in this section, we shall, probably, do little more than repeat our former propositions, under different aspects. It seems to be regarded as well settled that the interest of the mortgagee, at any time before final foreclosure, is merely of a chattel character. And the fact of having entered for foreclosure, under the statutes of some of the states, where such an entry and continued possession for a short term, limited for that purpose, will operate to bar all rights of the mortgagor, will make no difference; the interest will pass under a bequest of personalty until the foreclosure becomes absolute.⁵¹

bequeathed be certain. For example, the testator doth bequeath his horse Bucephal, whereas the name of his horse is Arundel, this error is not hurtful, but that the legatary may obtain the horse Arundel, if the testator's meaning be certain. For names were devised to discern things. If therefore we have the thing, it skilleth not for the name." But where the misdescription is such that the thing intended cannot be made to conform to the name given it, the bequest must fail. Swinb. pt. 7, § 5, pl. 8. "The error in the name appellative of the thing bequeathed doth destroy the legacy." This term "appellative" seems to be used as a designation of the genus, as horses, oxen, gold, or apparel, in regard to which it is here said that the name of the one cannot carry the other. But as to an error in regard to the particular species of the genus the consequences are not thus fatal, as where the testator describes the horse, &c., by a wrong name or color, &c., having but one, or where the particular animal intended is otherwise rendered certain. And where the devise was of all the testator's freehold land, "situate and being in or forming the whole or a part of" a certain set of buildings, part of which the testator owned in fee, subject to a lease; of another part he had a lease for years; and of the part now in question he was possessed for a term of years, and of the reversion of the same in fee from the expiration of three years after the end of the term; it was held, that both the freehold and leasehold interest in the last portion passed under the devise. *Mathews v. Mathews*, Law Rep. 4 Eq. 278. See also *Underhill v. Vandervoort*, 56 N. Y. 242.

⁵¹ *Fay v. Cheney*, 14 Pick. 399. In *Penniman v. French*, 17 Pick. 404, it is said by *Putnam, J.*, that promissory notes are to be regarded as choses in action following the person of the owner, and not as having any location, either within the dwelling or without. A bequest of money will only include money on hand or deposited in bank, and not money due. *Beck v. McGillis*, 9 Barb. 35; *Mann v. Mann*, 1 Johns. Ch. 231. And in *Beck v. McGillis*, supra, it is said, a bequest of all bonds and mortgages for sales of land made, or to be made hereafter, cannot be so construed as to include contracts for the sale of lands. There is a case in Pennsylvania (*Smith v. Davis*, 1 Grant's Cases, 158), where it is said, the word "money" in a will may be construed money on hand and in bank, or may stand for the whole personal estate, whichever sense will best effectuate the general intent of the testator, as indi-

* 17. The rule of allowing general terms to receive a * 125 limitation upon their meaning, with reference to the preceding bequest, obtains, to a certain extent, in all places and in all courts. Thus, a bequest of "all my out-door movables," following a bequest of "my chaise and easy-chair," and followed by an exception of "my stock and hay," was very properly held not to include promissory notes; and, there being no other bequest in the will which could embrace them, they were held to pass under the statute of distributions as intestate estate.⁵²

18. A bequest of \$500, "to be taken out of such property as the legatee shall think proper," will not justify a selection from the real estate, but the legatee may take any of the personal estate at its market value.⁵³

19. As before stated, in regard to the established rule in the English courts, it seems to be well settled in the American courts, that, as a general thing, the bequest of the interest of a particular sum will not be construed the same as giving an annuity of the * same amount, although payable annually; but it * 126 will be regarded simply as the gift of the income or interest of that amount.⁵⁴ And in the last case cited, contrary to some other cases and to the general rule, it was held, that it would not in such case become the duty of the executor to invest the principal until the end of the year, and that consequently no payment would become due until the expiration of two years from the death of the testator. But in one case⁵⁵ it was considered, that the

cated by the whole instrument. But we apprehend the latter construction is only allowable under such peculiar circumstances as very clearly indicate that such must have been the testator's meaning in the use of the term. It is said in *Fulkeron v. Chitty*, 4 Jones, Eq. 244, that the word "money" may be so construed as to embrace bank-stock, notes, and bonds, where the context of the will favors that construction. But money found after the death of the testator, in a secret drawer of a chest belonging to him, will not pass by a specific bequest of the chest, but will form part of the residue of the estate, for which the executor must account. *Smith v. Jewett*, 40 N. H. 513.

⁵² *Penniman v. French*, 17 Pick. 404. And the terms, "all of every thing on hand," in connection with a bequest of household furniture and tools, was held not to pass promissory notes and other choses in action. *Young v. Young*, 3 Jones, Eq. 216.

⁵³ *Fisk v. Cushman*, 6 Cush. 20. And where the legatee has an unlimited election as to the quantity, she may take the whole. *Garrison v. Eborn*, 3 Jones, Eq. 228. ⁵⁴ *Booth v. Ammerman*, 4 Bradf. Sur. Rep. 129.

⁵⁵ *Brimblecom v. Haven*, 12 Cush. 511.

bequest of the interest of a certain sum, not setting apart any fund for the payment of the same, was a gift of an annuity equal to the interest upon the sum named, at the rate fixed by law; and that it was not chargeable with any tax,⁵⁶ or deduction on account of the services of the executor in the management of the same.

20. The bequest to his daughter of the amount of a certain note which the testator held against her husband, "to be paid by my executor as soon as convenient after my decease," was held to pass the note itself, and not an equal amount of money.⁵⁷

21. The terms "estate" and "property"⁵⁸ will embrace both realty and personalty, and it requires clear evidence of such intention to induce the court to give a more restricted import to these terms.⁵⁹

22. The devise of "all the residue of my estate, real and personal," will include a sum of money specifically bequeathed to a child in ventre sa mère, but which was afterwards still-born.⁶⁰ In general, as before stated, real estate not effectually devised goes to the heir; but a residuary devise of all property was held to carry real estate attempted to be, but not effectually, disposed of by the will.⁶¹ It is said⁶² that a lapsed legacy is more generally

* 127 allowed * to go to swell the residuary bequest than one that is void, as being against the policy of the state, but it seems questionable how far any such distinction is maintainable.

23. The bequest of a "home on the farm" was held not void for uncertainty.⁶³ And in another case⁶⁴ it was held, that, in giving effect to a bequest of a reasonable support to the widow of the

⁵⁶ *Swett v. City of Boston*, 18 Pick. 123. In this case the testator gave his daughter the interest upon \$50,000 during her natural life, the principal, at her decease, to be equally divided among her children; and it was held not to be setting apart that sum for the benefit of his daughter and her children, but to be the gift of a definite annual sum equal to the interest upon \$50,000, to be paid by his executors out of his estate, and that consequently the \$50,000 could only be taxed to the estate during the life of the daughter.

⁵⁷ *Howe v. Bemis*, 2 Gray, 205. ⁵⁸ *Andrews v. Brumfield*, 32 Miss. 107.

⁵⁹ *Morris v. Henderson*, 37 Miss. 492. The terms "all the rest," following other bequests, held to embrace real as well as personal estate. *Attree v. Attree*, L. R. 11 Eq. 280.

⁶⁰ *Faust's Adm'rx v. Birner*, 30 Mo. 414.

⁶¹ *Morris v. Henderson*, 37 Miss. 492.

⁶² *Allison v. Allison*, 3 Jones, Eq. 236.

⁶³ *Willett v. Carroll*, 13 Md. 459.

⁶⁴ *Thompson v. Carmichael*, 3 Sandf. Ch. 120.

testator, regard should be had to the extent and income of the estate, and the propriety of her living with, and taking care of, her small children. And under a bequest to the widow, in lieu of dower, of "a decent and comfortable support and maintenance in sickness and in health," it was held, that in view of her station and mode of life, and the amount of the estate, she was entitled to be supported in house-keeping, economically, at the place of her residence.⁶⁵

24. In the will of the author of the Commentaries on American Law, there was a specific bequest of the copyright of that work, "with the right of renewal of all previous and future editions according to law, and all other rights and privileges pertaining to the copyright." The residuary bequest enumerated "unsold Commentaries on hand." At the date of the will, a part of a previous edition was on hand, which was sold before the death of the testator. But at the time of his death there was a new edition in the course of printing, and it was held to pass under the specific bequest, and not under the residuary clause.⁶⁶

25. In examining the cases upon legacies and devises, an almost infinite variety of terms come up for construction; but the decisions are controlled, in the main, by the special circumstances of the particular case, and are not therefore, as before often suggested, of much value for future use; but such cases are not entirely without value, as defining the degree of strictness or latitude which the courts have tolerated, in fixing the construction of bequests in wills. Thus the term "provisions," in connection with household supplies, was held to include wine and brandy which the testator had provided for his own use.⁶⁷ The word "estate," in a will, as applied to real property, may have *reference *128 either to the quantity of interest, or the thing devised, or both; and the sense in which it is used must be determined by the

⁶⁵ *Tolley v. Greene*, 2 Sandf. Ch. 91. Where a married woman, in an unsound state of mind, was entitled to certain trust-funds, upon the death of her husband, under a marriage settlement, it was held, that, the husband in his will having also provided for her maintenance, this latter was the primary fund for that purpose. *Gisborne v. Gisborne*, 23 W. R. 151, citing *Rudland v. Crozier*, 2 DeG. & J. 143; s. p. *Conant v. Stratton*, 107 Mass. 474. The mode of estimating damages for not paying a legacy for support in a suit upon the executor's bond is here considered.

⁶⁶ *Hone v. Kent*, 6 N. Y. 390, reversing s. c. 11 Barb. 315.

⁶⁷ *Mooney v. Evans*, 6 Ired. Eq. 363.

will itself.⁶⁸ A watch worn by the testator is not regarded as passing under a bequest of "wearing apparel."⁶⁹

26. The devise of a "house" will carry all within the curtilage, the same as the term "messuage."⁷⁰

27. A bequest of a cabinet with whatever it contains, except money, was held not to pass a promissory note, payable to the testatrix, of a date anterior to that of the will, and which was found in the cabinet at her decease.⁷¹

28. A bequest to the wife of all ready money at testator's banker's, in his dwelling-house, or elsewhere, meaning money not invested in security or otherwise bearing interest, but what might be on hand, for current expenses, at the time of his decease, was held to carry all money at his banker's, or in the hands of his agents, and dividends due on stocks at his decease; but not the rent of a house, or the interest of a sum due on mortgage.⁷²

29. And a bequest of all debts due and owing to the testator, at the time of his death, will carry a bond conditioned for replacing stock which testator had sold after the date of his will, and lent the proceeds to the obligor, the time of reinvestment having passed at the testator's decease. And it was by consequence held that this bond could not be included in a residuary bequest of his stock and funds.⁷³

30. The bequest of the principal due upon a bond was held not to carry the interest.⁷⁴ Where the share of one of two or more joint residuary legatees fails, by the legatee deceasing before the time of distribution, but after the testator, his share will go to the survivors according to the direction of the will, notwithstanding he survived the testator.⁷⁵

31. Where the testator had used the words "devise," and "bequeath," throughout his will, in their strict technical sense,

⁶⁸ *Hart v. White*, 26 Vt. 260.

⁶⁹ *Gooch v. Gooch*, 33 Me. 535; *Heirs of Sawyer v. Sawyer*, 28 Vt. 245.

⁷⁰ *Rogers v. Smith*, 4 Penn. St. 93.

⁷¹ *Read v. Stewart*, 4 Russ. 69. But see *Richmond v. Vanhook*, 3 Ired. Eq. 581. A bequest to testator's wife of £1,060, his writing-desk, and "all the small coin, curiosities, and other articles" therein, held not to carry gold coin, bank-notes, silver, and copper contained in the desk. *Dutton v. Hockenhull*, 22 W. R. 701.

⁷² *Fryer v. Ranken*, 11 Sim. 55. ⁷³ *Essington v. Vashon*, 3 Mer. 434.

⁷⁴ *Stultz v. Kiser*, 2 Ired. Eq. 538; *Richmond v. Vanhook*, 3 Ired. 581.

⁷⁵ *Hillyer v. Dunn*, 2 Green, Ch. 390.

as *applicable to real or personal estate, respectively, * 129 it was held that a residuary bequest to the above-named specific and pecuniary legatees, according to the amount of their legacies, will not embrace devisees of real estate.⁷⁶

32. A bequest of "property" will carry choses in action.⁷⁷ So also a bequest of "personal property" will embrace a claim upon the state for half-pay, recognized by act of the legislature before testator's death, and paid to his representative after.⁷⁸

33. The forms of expression in wills are so various that little aid is ordinarily afforded by repeating them, except for analogies. But we may here repeat a few. "All the remainder of my moneys" will not embrace money in the funds.⁷⁹ And canal shares are not included in "property in British or foreign bonds, funds, or securities of any description."⁸⁰ The words "shares or interest" will not carry a policy of insurance in the company named.⁸¹ The "interest and dividends" in the funds will not embrace dividends due at testator's decease, but only such as accrue after.⁸² The word "money" in a will means that, and nothing else. But when used with other words, it may have much greater extension.⁸³ Where the testator gave "his policies," but misdescribed them, it was held sufficient to pass such as he had.⁸⁴

34. Where the owner of a homestead purchases another adjoining it, but fronting upon another street, and never occupies it himself or uses it in connection with his homestead, or removes the fence between the lots, but lets it to tenants during his life, it will not pass under a devise of his house-lot, notwithstanding he may have repeatedly said he bought it for his own use, and for the

⁷⁶ *Havens v. Havens*, 1 Sandf. Ch. 324.

⁷⁷ *M'Lemore v. Blocker*, Harp. Ch. 272; *Sprigg v. Weems*, 2 Har. & McHen. 266.

⁷⁸ *Wood v. George*, 6 Dana, 343. ⁷⁹ *Willis v. Plaskett*, 4 Beav. 208.

⁸⁰ *Huddleston v. Gouldsbury*, 11 Jur. 464; 10 Beav. 547. See also *Richards v. Patteson*, 11 Jur. 113.

⁸¹ *Harington v. Moffat*, 4 DeG., M. & G. 1. See also *Surtees v. Hopkinson*, 13 Jur. 181; 15 Sim. 501.

⁸² *Shore v. Weekly*, 13 Jur. 1022; 3 DeG. & Sm. 467; *Constable v. Bull*, id. 619; 3 DeG. & Sm. 411.

⁸³ *Glendenning v. Glendenning*, 9 Beav. 324. "Money and securities for money" will not embrace bank-stock and canal shares. *Ogle v. Knipe*, 17 W. R. 1090; s. c. L. R. 8 Eq. 434.

⁸⁴ *Waters v. Wood*, 5 DeG. & Sm. 717.

benefit of his house-lot, in order to annex it to that.⁸⁵

* 130 "My * manufactory on the west side of H street, now in the occupation of A.," will not embrace a manufactory on the east side of the same street, although in the occupation of A., and used in connection with the one on the west side.⁸⁶ Devise of premises, "as now in the occupation of A.," will not pass the privilege to draw water from a pump on adjoining premises of the testator, although long enjoyed by A., with the consent of the testator, and which was the only means of obtaining water for the use of those premises.⁸⁷

35. Where the testator gave his whole personal estate to his grandson by name, subject to the payment of his debts, funeral and other expenses of administration, and legacies "and the trusts hereinafter named," there being no other residuary clause, it was held, upon the construction of the whole will, that, after the performance of the trusts enumerated, the grandson took the residue for his own benefit.⁸⁸

36. A bequest of the testator's portion of leasehold estate, held as joint-tenants, by himself and partner, as partnership estate, on which the business was carried on, was held to carry only the testator's interest as partner, after all partnership liabilities were cancelled; and, as the effects of the partnership fell short of meeting its liabilities, it was declared that nothing passed by the bequest.⁸⁹ This was a case where the estate of the testator was ample for meeting the partnership liabilities, without resort to the leaseholds thus conveyed under the will.

⁸⁵ *Perkins v. Jewett*, 11 Allen, 9.

⁸⁶ *Smith v. Ridgway*, Law Rep. 1 Ex. 46.

⁸⁷ *Polden v. Bastard*, Law Rep. 1 Q. B. 156. See also *Pedley v. Dodds*, Law Rep. 2 Eq. 819; *Wilbar v. Smith*, 5 Allen, 194. Where bequests and annuities are given in the same will, a general provision, that on a deficiency of assets the legacies shall be proportionately reduced, will embrace annuities. *Stutely v. Kepp*, 17 W. R. 393. A bequest of any money which the testator might die possessed of, or which might be due and owing to him at his decease, held to include money due on a policy on the testator's life. *Petty v. Willson*, Law Rep. 4 Ch. App. 574. And in *Byrom v. Brandreth*, L. R. 16 Eq. 475, the same terms were held to embrace all money in possession and at the bank or elsewhere, and under the immediate control of testator, as money.

⁸⁸ *Clarke v. Hilton*, 12 Jur. N. S. 721; s. c. Law Rep. 2 Eq. 810.

⁸⁹ *Farquhar v. Hadden*, L. R. 7 Ch. App. 1.

SECTION VII.

SPECIFIC AND DEMONSTRATIVE LEGACIES. DISTINCTION BETWEEN
SPECIFIC AND GENERAL LEGACIES.

1. The general definition of this distinction.
2. Not requisite that the corpus of a specific legacy be in existence at the time of giving.
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§ 7. 1. THE distinction between specific and general legacies is one which, in general, would not be attended with any difficulty. A legacy is said to be general when it is not answered by any particular portion of, or article belonging to, the estate, the delivery of which will alone fulfil the intent of the testator; and when it is so answered, it is said to be a specific legacy, because it
 * 132 * consists of some specific thing belonging to the estate, which is, by the legacy, intended to be transferred, in specie, to the legatee.¹ All legacies are either general or specific.

¹ 2 Wms. Ex'rs, 1041, 1042. A bequest of money, naming the sum, "or the value thereof, in other property," is a general legacy. *Fagan v. Jones*, 2 Dev. & Batt. Eq. 69. But a bequest of all the money which shall be received under the decree in a certain suit is specific. *Chase v. Lockerman*, 11 Gill & J. 185; *Gilbreath v. Winter*, 10 Ohio, 64. And a bequest to the testator's wife of one year's provision is a general legacy. *Everitt v. Lane*, 2 Ired. Eq. 548. A bequest of all the testator's right, interest, and property in thirty shares in the Bank of the United States of America, is a specific legacy. *Walton v. Walton*, 7 Johns. Ch. 258. So a bequest of £5,000 consols, with a direction, that, if the testatrix should not have enough stock to answer the legacy, her executors should, out of her residuary estate, purchase sufficient to make up the deficiency, was held to create a specific and not a merely demonstrative legacy. *Townsend v. Martin*, 7 Hare, 471. So also a bequest of £4,000 capital stock in the £3-per-cent consols, or in whatever of the government funds the same shall be found invested, was held to be a specific legacy. *Hosking v. Nicholls*, 1 Y. & C., C. C. 478.

The same general distinction applies to the bequest of chattels. The use of the definite article, as applicable to the thing bequeathed, instead of the indefinite article, or of the word "my," as showing its present existence and property by the testator, tends to indicate a specific bequest. Thus a bequest of a horse, ring, or other article, is a general legacy; and if the testator leave no

2. It has sometimes been made a question how far the thing constituting the corpus of a specific legacy must be in existence, or belong to the testator, at the time of making of the will, but we apprehend that there is no good ground for any such inquiry. Where the testator bequeathed the dividends of all stocks he should be entitled to, at the time of his decease, in the public funds, and had £10,000 consols at his death, it was held to be a specific bequest.²

* 3. In *Fontaine v. Tyler*³ Chief Baron *Richards* discusses. * 133

such article, or in fact never had any such article, it is still a good legacy, and the executor must procure one to meet the bequest. But if the bequest be of the horse in my barn, or the ring in my cabinet, it will ordinarily be regarded as a specific bequest, having reference to some specific article which alone can answer the will. *Richards*, Ch. B., in *Fontaine v. Tyler*, 9 Price, 94; Lord *Langdale* in *Stephenson v. Dowson*, 3 Beav. 342, 349; *Richards v. Richards*, 9 Price, 219, 230.

² *Stephenson v. Dowson*, 3 Beav. 342. Lord *Langdale*, M. R., here said: "A specific legacy is something distinguished from the rest of the testator's estate; and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease. . . . A bequest of the horses . . . the testator had in his stable, . . . of all the plate which should be at a certain house, . . . or a library or collection of books which the testator should have in a particular room," or "of all the testator's wearing apparel and things of that sort," and in each instance limited to the time of his death, are here put as illustrations of specific legacies.

³ 9 Price, 94, 104. It is here said, that, "if the testator had not had £10,000 in the stock specified at the time of his death, it would have been in that case a pecuniary legacy beyond all doubt." The gift of a particular horse "would unquestionably be specific; yet if, in the event of the testator having no horse at the time of his death, he should give the legatee some other chattel to supply the loss, that would not have the effect of making the first gift not specific. . . . I am clearly of opinion this was a specific and not a pecuniary legacy." The term "pecuniary," as applied to legacies, is here used as synonymous with "general;" but it is not regarded as altogether so definite in its import, since some general legacies are not pecuniary, and some pecuniary legacies are not general, as a specific legacy may be pecuniary. And the question has actually arisen in one case, at least, whether the terms "pecuniary legacies" included specific legacies. *Douglas v. Congreve*, 1 Keen, 410. In this case it was held that a specific legacy in stock was not a pecuniary legacy, but the decision turned upon the distinction between stock and money, and not upon that between general and specific legacies. And a bequest of the whole of testator's shares in the H. bank, amounting to \$6,000, the testator at the time owning sixty shares, which amounted to that sum, with the provision, that, if he should dispose of the shares, the legatee should have \$6,000 in money, is a specific legacy of the sixty shares, and thirty-six shares afterwards purchased

the distinction between general and specific legacies in regard to a bequest of £10,000 stock to which the following qualification was attached: "If I shall not have so much as £10,000 capital stock in the three-per-cent reduced or consolidated bank annuities, or one or both of them, I will that my executors shall make up the capital sum of £10,000 in the three-per-cent reduced or consolidated bank annuities, or one or both of them." He died, leaving £70,000 three-per-cent consols, and £9,000 three-per-cent reduced annuities, and the legacy was held to be specific. It was here held that such a legacy is specific, with the substitution of a general pecuniary legacy, in case of its failure, to be satisfied

* 134 in a specific manner. * The same legacy may be specific where it can be specifically satisfied, and be made general where it cannot.

4. Since specific legacies wholly fail, if the testator never had the thing described, or if he part with it, or convert it into other property before his decease, it becomes important to determine what is the precise intention of the testator, and what forms of expression in the will are sufficient to render the legacy specific. The common illustration taken from the civil law,⁴ "If he had said, 'I bequeath . . . my watch, or my diamond ring,' and there were not found in the succession either diamond ring or watch, the legacy would be null; but if he had said, 'I bequeath a diamond ring,' or a watch, the legacy would be due, and would have its effect," is quite intelligible, and fully recognized in the English law at the present time.⁵

5. A mistake in the description of the thing bequeathed, specifi-

by the testator will not pass. Foote, Appellant, 22 Pick. 299. So also a bequest of two shares of bank-stock, in case it should not be absorbed in the payment of debts against the estate, was held to fail, the bank-stock not being sufficient to pay all the legacies, there being no debts due from the estate. McGuire v. Evans, 5 Ired. Eq. 269. A specific devise of one's indebtedness to the testator not treated as a legacy, so as to enable the debtor to share with other legatees in a contingent fund. Sholl v. Sholl, 5 Barb. 312. So, too, a bequest of shares in the capital stock of a joint-stock company has been held to be specific, although the testator held stocks of the denomination in excess of the bequest. Norris v. Thomson, 1 C. E. Green, 218, 542; s. c. 2 McCarter, 493.

⁴ 2 Domat, Cush. ed. 520, pl. 3546; Dig. L. 32, § 5, D. de leg. 2.

⁵ Purse v. Snaplin, 1 Atk. 414; Richards v. Richards, 9 Price, 219.

cally, which is susceptible of correction by the context, or by any fair intendment, shall not be allowed to defeat the legacy ; as where the testator had one horse only, which is white, and gives " my black horse," it is said there can be no doubt of that being the horse intended, and the legatee shall therefore have the horse as a specific legacy.⁶ But if the testator have two white horses, and bequeath " my white horse," parol evidence may be received to show which he intended to give.⁷

6. There is no doubt money may be the subject of a specific bequest, as where the testator gave £1,000, deposited in a certain place, or in the hands of a certain person. In *Lawson v. Stitch*,⁸ the Lord Chancellor said : " It is pretty difficult to make pecuniary legacies specific ones, but some such there are, as in the case of a sum of money in such a bag, the devise of a bond or other security, . . . the devise of money out of such a security." Where a legacy was of the " value " of securities then in the testator's possession, being navy bills, which were afterwards paid by exchequer bills and money, the money being also invested in exchequer bills, and all remaining on hand at the decease of the testator, it was held to create a specific legacy.⁹

* 7. The testator gave his partner £2,000, being a bal- * 135
ance found due him on the last settlement, adding, " if I do not draw it out of trade,"¹⁰ and it was held to create a specific legacy. Lord *Hardwicke* said : " If those latter words had not been inserted, I should have been inclined to think it was not spe-

⁶ 1 Roper, 193.

⁷ Ante, vol. 1, §§ 40, 41, and cases cited; 1 Roper, 193, 194, and notes.

⁸ 1 Atk. 507.

⁹ *Pulsford v. Hunter*, 3 Br. C. C. 416. And in a recent case, *Powell v. Riley*, L. R. 12 Eq. 175, a bequest of " all my household goods and furniture, live and dead farming-stock, money, and security for money, goods, chattels, and effects, and all other my personal estate," was held to create a specific legacy, liable only to contribute for the payment of debts, with other specific legacies of real estate.

¹⁰ *Ellis v. Walker*, Amb. 309. It is here said a distinction has prevailed where there has been a legacy of a sum of money out of a debt, that it is not specific, but considered to be given out of the debt as a readier fund, and therefore only demonstrative. And the good-will of a business may be specifically bequeathed. *Fryer v. Ward*, 9 Jur. N. S. 164; s. c. 31 Beav. 602. So also a bequest of all testator's balance in the hands of any banker will carry money collected for the testator, and deposited in the name of his agent, without the bank knowing of testator's interest. *Heming v. Whittam*, 2 Sim. 493.

cific, but I cannot get rid of those words. . . . The court leans against considering legacies as specific."

8. It seems to be clearly settled that no direction, out of what fund the money is to be raised, unless it so identify the money that the legatee can say to the executor that all or a portion of the very moneys of the fund are thereby transferred to him, will render the bequest specific. Nor will it render the legacy specific, that it is directed to be for some specific use, as for rings,¹¹ or for the payment of executor's services,¹² or for servants,¹³ or for charity,¹⁴ or to be laid out in lands,¹⁵ or in government securities.¹⁶

9. One important consequence of a legacy being specific is, that it is not subject to contribute to make up any unexpected deficiency which may arise in regard to the other portion of the estate; nor can the specific legatees claim to have any deficiency, which may arise in regard to their legacy, made up to them. Specific legatees must depend exclusively upon the particular money, security, fund, or thing, which is specifically identified in the gift. If that can be found among the effects of the testator, the legatee is entitled to demand it of the executor; and if it cannot be so found and identified, he has no claim upon the estate on that account.¹⁷ Upon

this ground it has sometimes been said, that only such legacies as * might be adeemed¹⁸ could be treated as specific.

But it seems now to be regarded no such distinction as can

¹¹ *Apreece v. Apreece*, 1 Vesey & B. 364.

¹² *Attorney-General v. Robins*, 2 P. Wms. 23.

¹³ *Attorney-General v. Robins*, *supra*.

¹⁴ *Masters v. Masters*, 1 P. Wms. 421, 423.

¹⁵ *Hinton v. Pinke*, 1 P. Wms. 539.

¹⁶ *Lawson v. Stitch*, 1 Atk. 507.

¹⁷ 1 Roper, 191; *Ashton v. Ashton*, 3 P. Wms. 384, 385; *Pitt v. Lord Camelford*, 3 Br. C. C. 160.

¹⁸ *Parrott v. Worsfold*, 1 Jac. & W. 594, 601. Sir *Thomas Plumer*, M. R., here said: "The ordinary criterion of a specific bequest is, that it is liable to ademption; that, if the thing bequeathed is once gone, it is lost to the legatee. . . . The word 'my' is evidence of its being specific, when the particular stock is also referred to; but it is not enough alone." But in *Bothamley v. Sherson*, L. R. 20 Eq. 304, it was held that if the testator bequeath "all my stock in the Midland Railway Company," having at the time £1,000 which he subsequently pledged in security for the debt of another on his assurance that it should be retransferred within three months; but which not being done, the creditors sold the stock after the death of the testator to enforce the debt, it was held that the legatee was entitled to have the stock replaced out of the general assets.

avail towards determining whether the legacy is general or specific.¹⁹ We shall have occasion to speak of the subject of ademption hereafter.

10. There is an intermediate class of legacies, between general and specific legacies, where a certain amount of money is given to come out of a particular fund. These are sometimes called, after the denomination in the civil law, demonstrative legacies. This class of legacies is not liable to be adeemed, and so fail, by the fund being called in or changed, but is still payable out of the general assets.²⁰ In this respect it partakes more of the nature of a general legacy. But in another particular, in that it is not liable to abatement, where the funds are insufficient to meet all the legacies, it partakes more of the nature of a specific legacy.²¹

11. The principal difficulty in distinguishing general and specific legacies seems to have arisen, of late certainly, in regard to the class called, or claimed to be, demonstrative. In a modern case²² a legacy of a sum of money owing to the testator by A. B., upon a mortgage of certain premises therein mentioned, and which was * paid off in the testator's lifetime, after the date of the * 137 will, was held to be a specific, and not a merely demonstrative legacy, and to have been adeemed by such payment. And

¹⁹ *Jacques v. Chambers*, 2 Coll. C. C. 435. In this case the testator bequeathed thirty shares of railway stock in a company in which he owned one hundred and twenty shares to his executors, in trust for certain legatees, and provided in his will that the legacy should not be deemed specific, so as to be capable of ademption. But the legatee was held to have thus become entitled to elect his number of shares, there being different classes, and to have the dividends from the death of the testator, and to be liable to all assessments upon the shares, thus declaring the legacy specific. See *Bothamley v. Shereson*, L. R. 20 Eq. 304.

²⁰ *Chaworth v. Beech*, 4 Ves. 555. But in this case, where the testator gave the money due upon a note, it was held a specific legacy upon the intention of the testator. And it is here held, that an indorsement upon a note or bond, "I give this note, or bond, to A.," may be proved as testamentary, which would not hold true, unless duly witnessed, under the present English statute of wills, or in the American states, where wills are required to be executed with due formalities, as well in regard to personalty as real estate. Such an indorsement could only operate now as a *donatio mortis causa*, where the security was delivered in the lifetime of the testator to the donee, or to some one for him. Post, *Settlement of Estates*, § 42.

²¹ 2 Wms. Ex'rs, 1043; *Coleman v. Coleman*, 2 Ves. Jr. 639.

²² *Sidebotham v. Watson*, 11 Hare, 170.

where the testator placed part of the mortgage money received by him upon the mortgage, in the bank, and afterwards drew out part of said deposit, leaving in bank, at the time of his decease, a balance, amounting to a moiety of the sum constituting the mortgage debt, it was held that the specific legatee of the mortgage debt was not entitled, in respect of such legacy, to the money so remaining in the bank. The Vice-Chancellor, Sir *William Page Wood*, in giving judgment, commented upon some of the leading cases bearing upon the particular phase of the question thus brought before him,²³ and concludes thus: "No authority, however, has been produced to show that in a case like the present, when the debt, which is the subject of the gift, is paid off, the money can be followed into the hands of another party, merely because the testator has not spent it, and that therefore it ceases to be within the principle of ademption. Ademption arises from this, — that you cannot find the thing which is adeemed. I think that principle applies to the present case, and that I must hold this legacy to have been specific, and to have been adeemed."

12. This subject was very extensively considered by the House

²³ The learned judge considered the case of *Le Grice v. Finch*, 3 Mer. 50, as the one most favorable to those who claimed this to be a general legacy. But in that case, which was the gift of £500, then out upon mortgage, and the interest due thereon, it appeared the testatrix had, at the time of making her will, £500 out upon mortgage, which she afterwards called in and applied to other purposes. Sir *William Grant*, M. R., held, that this was not a specific legacy, carefully distinguishing the case from the gift of a particular debt. "It was not the mortgage debt that was given, but the money which the testatrix . . . had out. The thing is not the mortgage, but the money. . . . The circumstance of its being on mortgage was accidental. . . . It was no ingredient in the gift by way of condition or inherent description." The learned judge also referred to *Gillaume v. Adderley*, 15 Vesey, 384, as distinguishable from the one before him, and to *Chaworth v. Beech*, 4 Vesey, 555, as being the same in principle as the one then before him, the gift there being "the before-mentioned sum of £8,000, . . . with the note" by which it was secured. And in *Innes v. Johnson*, 4 Vesey, 568, it was held that the gift of "£300, upon bond," there being a bond of that amount belonging to the testator, must be regarded as specific. See *Oliver v. Oliver*, L. R. 11 Eq. 506. But in *Mytton v. Mytton*, 23 W. R. 477, a bequest of all testatrix's money which should be invested at her decease, she having at the date of the will £3,000 invested in the Indian Loan, but which was paid during her life, and had none invested at her decease, was a demonstrative and not a specific legacy. See also *Page v. Young*, 23 W. R. 479; L. R. 19 Eq. 501; *Bothamley v. Sherson*, 23 W. R. 848.

of Lords, in *Creed v. Creed*,²⁴ and the careful reading of that case * will throw much light upon the subject. That * 138 was the case of annuities charged upon real estate in the first instance; then debts charged upon the same real estate, in aid of the personal estate; then an annuity, given in similar terms with the first. There were given several pecuniary legacies, to be paid out of the residue of the personal estate, and, upon a deficiency of personal estate, to be raised in the discretion of the trustees out of the real estate. Lastly, the testator gave two annuities to his servants in similar terms with those before given. The personal estate was insufficient to pay the debts and legacies, and the real estate was insufficient to pay the annuities and legacies; and it was held that, upon the true construction of the provisions of the will, the annuities were entitled to priority over the legacies. This is partly upon the probable intention of the testator, as inferable from the phraseology of the will itself, but mainly from the fact of the annuities being made a recent charge issuing out of the land, which was regarded as creating an interest in the land, and being, therefore, necessarily specific.²⁵ In regard to this particular question, his lordship said: "There are many cases in which, though a legacy be charged upon a particular fund, it does not fail by failure of the fund, which are called demonstrative legacies; but these all proceed upon the construction showing a general intent to have the legacies paid without reference to the fund. Such was the case of *Fowler v. Willoughby*.²⁶ But in such cases, if the particular fund be applicable, the legatee is entitled to the benefit of it, in preference to others having only a general claim. Such was the case of *Acton v. Acton*.²⁷ Whether, there-

²⁴ 11 Cl. & Fin. 491.

²⁵ Lord *Cottenham*, who gave the leading opinion in this case, cited, in confirmation of this proposition, *Long v. Short*, 1 P. Wms. 403; *Davenhill v. Fletcher*, Amb. 244; *Spong v. Spong*, 3 Bligh, N. S. 84; S. C. 1 Dow & Cl. 365.

²⁶ 2 Sim. & Stu. 354.

²⁷ 1 Mer. 178. In *Malone v. Mooring*, 40 Miss. 247, the distinction between specific, demonstrative, and general legacies is considerably discussed. It seems to be the prevailing doctrine of the cases, and of most of the late cases especially, that to constitute a specific legacy the intent must be very clear to limit it to the particular subject-matter given. A demonstrative legacy is one that the testator intends to have paid without reference to the particular fund, but chooses to charge upon the particular fund also, as the natural and con-

* 139 fore, the annuities in the present case * are to be regarded as specific gifts of interest in the lands, or as primarily payable out of them, no others, not standing in the same situation, can interfere with the rights of the annuitants."

13. This subject was examined in *Colville v. Middleton*,²⁸ in regard to a bequest of £5,000, due upon a marriage settlement, which was directed to be paid when and if the same should be got in, and not otherwise; and, in case the £5,000 should be received by the testator in his lifetime, he directed the same to be raised out of his estate called X.; and the testator received the £5,000 during his life. It was held that the legacy was demonstrative, and a charge upon the general personal estate, as well as the estate X.

14. The recent decisions in the English courts of equity seem to establish the point, that, if the words of the will apply to any particular fund in the testator's possession at the date of the will, but which he afterwards changes, in whole or in part, the court will not apply the words so as to include the substituted securities, In *Gilliat v. Gilliat*,²⁹ where the testator bequeathed "his \$10,000 Indiana 5-per-cent stock," and had, prior to the execution of his will, possessed such stock, but at that time it had been changed into \$5,000 of that stock, some 2½-per-cent Indiana stock, and some canal stock, all of which he retained until his death, it was held that the \$5,000 alone passed.

15. In the late case of *Moore v. Moore*,³⁰ where a widow, venient mode of payment. A specific legacy must fail unless paid in the particular mode pointed out. A demonstrative legacy has a prior claim upon the particular fund above general legacies, and must be paid in full in preference to general legacies so long as the particular fund is adequate. And to the extent that that fails, demonstrative legacies will abate in proportion to general legacies, and be paid in full when there is sufficient to pay all the legacies.

²⁸ 3 Beav. 570. The Master of the Rolls here cited the case of the Attorney-General *v. Parkin*, Amb. 566, as being much stronger than the one before him. In *Cartwright v. Cartwright*, 2 Br. C. C. 114, the testator said in his will, "I give £1,400, for which I have sold my estate this day." The testator afterwards received the whole money, paid it to his banker, and afterwards drew out £1,100 of the money, and it was held to be a legacy of so much money, and payable absolutely, as being demonstrative, and not a specific bequest of the particular money named.

²⁹ 28 Beav. 481.

³⁰ 29 Beav. 496. Nice questions sometimes arise in regard to the extent of a specific bequest. In a late case (*Field v. Peckett*, 29 Beav. 573), the testator

* being entitled to one-third of her husband's personal estate, took out administration, and, having sold a sum of stock belonging to the estate, reinvested the produce, with a small addition in another stock, in her own name, and by her will bequeathed to her son all her share in the personal property of her husband to which she became entitled at his decease, it was held that the stock passed as a specific bequest to the legatee.

16. In a late case decided by Vice-Chancellor *Kindersley*, the distinction between specific and demonstrative legacies is extensively discussed.³¹ It is here determined, that a legacy

bequeathed "all the household furniture, plate, china, books, &c., and other household effects of which I shall die possessed," and a question was made in regard to it including forty-two snuff-boxes, made of gold, silver, china, tortoise-shell, and agate, which were used by the testator for the purpose of ornament in and about his mansion, and it was held they passed to the legatee. And in this case it was decided, that cabinets for china which had been ordered by the testator and made before his death, but not delivered until afterwards, passed also under the bequest, and that the bill for making was a proper charge against the executor. But a bequest of £6,000, to be paid so soon as the testator's property is realized, must be held a general legacy, and payable, whether any thing is ever realized from the source indicated or not. *Sadler v. Turner*, 8 Vesey, 617. A legacy out of a particular fund is still a general legacy. *Deane v. Test*, 9 Vesey, 146. But see *Attorney-General v. Grote*, 3 Mer. 316; *Symons v. James*, 2 Younge & Coll. C. C. 301. The guaranty of the sufficiency of a fund indicates the purpose of making the legacy general. *Wilox v. Rhodes*, 2 Russ. 452. An annuity for life charged on personal estate is not specific. *Hume v. Edwards*, 3 Atk. 693. A bequest of all the plate at a particular house is specific; and if that house be surrendered to the landlord, and another procured by testator's steward in his absence abroad, but afterwards approved by him, the legacy is thereby adeemed. *Shaftsbury v. Shaftsbury*, 2 Vernon, 747. But if the testator have but one service of plate, which he carries from house to house, it will pass by description as being at one house, although found at another at testator's death, which seems the more natural and reasonable construction. *Land v. Devaynes*, 4 Br. C. C. 537. See *Norris v. Norris*, 2 Coll. C. C. 719.

³¹ *Mullins v. Smith*, 8 Weekly Reporter, 739; s. c. 1 Drew. & Sm. 204. Under a bequest of all the money in the public funds of which the testator might be possessed or entitled to at the time of his decease, stock which had been ordered to be purchased by his broker, and which had been charged to his account, but not actually purchased until five hours after his death, is not included. *Thomas v. Thomas*, 27 Beav. 537. A bequest of £4,000 in parcels of £2,000 to one, £1,000 to another, and £1,000 to sink into the testator's general estate, creates specific bequests as to the two former. *Duncan v. Duncan*, 27 Beav. 386. The precise distinction between specific and demonstrative

* 141 out of stock * is specific, but a bequest of money out of stock is not, but demonstrative; that a specific legacy is not liable to abate, but a demonstrative legacy is; a specific legacy is liable to ademption, but a demonstrative one is not; a specific legacy carries with it the dividends from the death of the testator, but a demonstrative one does not.

17. Where a testatrix bequeathed "the sum of £2,000 long annuities standing in my name in the books of the Governor and Company of the Bank of England," and at the date of her will and at the time of her death was possessed of but £300 long annuities, but had other personal estate of considerable value, it was held to be a specific and not a demonstrative legacy, and that the legacy failed except as to the £300.³²

18. Questions of importance often occur in regard to particular funds belonging to the estate being primarily charged with the payment of demonstrative legacies, and by consequence other funds constructively exonerated. Vice-Chancellor *Stuart* held, in *Sellon*

legacies is one of great importance, and of no slight difficulty. In *Paget v. Hurst*, 9 Jur. n. s. 906, Vice-Chancellor *Wood* held, that annuities, charged upon the rents of real estate, devised subject to the charges, which proved insufficient for the purpose of paying the annuities, were not specific, but demonstrative gifts, and that the deficiency must be paid out of the capital of the residuary personal estate. And where a lady gave certain legacies, desiring her supposed husband to pay them out of her personal estate, which she mistakenly supposed had become his, the marriage being invalid, the lady survived the husband, and the legacies were held demonstrative. *Jones v. Southall*, 9 Jur. n. s. 93; 32 Beav. 3. So legacies payable out of the avails of a partnership are held demonstrative. *Bevan v. The Attorney-General*, id. 1099; s. c. 4 Giff. 361. "The rest of my property in consols" is a specific legacy. *Foxen v. Foxen*, 10 L. Times, n. s. 290.

³² *Gordon v. Duff*, 6 Jur. n. s. 1046; s. c. 28 Beav. 519; s. c. affirmed, 7 Jur. n. s. 746. The good-will of a partnership business cannot become the subject of a specific bequest, as it belongs to the surviving partners. *Robertson v. Quiddington*, 28 Beav. 529; *Lewis v. Langdon*, 7 Sim. 421. A legacy of one-half of all my stock in the following-named railways, naming certain companies, and one-half of my stock in the W. bank, creates a specific legacy, and the income of such stocks will go to the legatee, and parol evidence is not admissible to show that such was not the intent of the testator. *Loring v. Woodward*, 41 N. H. 391. Any thing in the will showing that the testator had reference to particular estate, as the government stocks or shares in public companies to which the testator might be entitled, renders the legacy specific. *Measure v. Carleton*, 30 Beav. 538.

v. Watts,³³ that demonstrative legatees must get their legacies, first, out of the demonstrative fund as far as it extended, and the balance only, together with the general legatees, out of the general fund; but that demonstrative legatees must abate with general *legatees as to the balance not paid by the * 142 particular fund, and have no right, after getting what they can out of the demonstrative fund, to claim their entire legacy, with the other legatees, out of the general estate. And in *Mullins v. Smith*,³⁴ it was held, that a specific legacy is not liable to abate for the payment of debts, but a demonstrative legacy is liable to abate, when it becomes a general legacy by reason of the failure of the fund out of which it is payable. From all which it would seem that a demonstrative legacy has the prior right to the fund out of which it is directed to be paid, as against all other claims except those of creditors. If that is so, and it seems to be the present inclination of the English courts, demonstrative legacies have all the advantage of specific legacies, in regard to the fund upon which they are charged, and are exempt from the disadvantage attending specific legacies, that if the fund fails, either wholly or in part, it results to that extent in defeating the bequest. For if the fund for a demonstrative legacy fails, the legatee may go against the general estate for the unpaid balance.

19. Where the testator gave a legacy of £500 £3-per-cent consols, or other stocks into which the same might be converted, or in case he should not be possessed of such stock, then he gave a legacy of as much sterling money as the amount of stock would have been worth at his death, it was held that the first part of the bequest, there being sufficient stock to answer it, created a specific legacy, but that the alternative provision, although expressed to be a substitute for the first, created only a general legacy.³⁴

20. There seems to have been no question but the specific legatee of shares in joint-stock companies, or of stock in the public funds, is entitled to the dividends which accrue after the death of

³³ 7 Jur. n. s. Dig. 134; 9 Weekly Reporter, 847. Where legacies are charged upon real estate which is devised subject to such legacies, and the personal estate is bequeathed in trust to pay debts and certain expenses, and to pay the rest to a charity, it was held that the personal estate was exonerated from the payment of the legacies charged upon the real estate. *Ion v. Ashton*, 28 Beav. 379.

³⁴ 1 Drew. & Sm. 204.

the testator, in analogy to the rights of tenant for life of such shares and stocks.³⁵ And of late years there seems to have

* 143 been no *question made, that where the company declare an extra dividend, or an enlarged dividend at the ordinary time, which in the English books is denominated a bonus, growing out of reserved earnings, or the recovery of suspended or contingent claims, that the tenant for life, or a specific legatee, is entitled to such extra dividend or bonus.³⁶ But this question arose in a

³⁵ *Barclay v. Wainwright*, 14 Vesey, 66. Some of the early cases treated an extra dividend, or occasional dividend, as a virtual distribution of extra capital, and as of right belonging to the owner of the remainder, and not to the tenant for life. *Brander v. Brander*, 4 Vesey, 800. See also *Witts v. Steere*, 13 Vesey, 363; *Norris v. Harrison*, 2 Madd. 268; *Irvine v. Houston*, cited in *Barclay v. Wainwright*, supra. See also *Preston v. Melville*, 16 Sim. 163, where the tenant for life was held entitled to a bonus declared in his time. See also *Paton v. Sheppard*, 10 Sim. 186. But in the late English cases where the articles of the company allowed the reservation of a portion of the income to meet contingencies, and the company added three new shares to a trust-fund out of the income for the purpose of representing the cost of new works deemed necessary, it was held the new shares were capital, and not income, as between the tenant for life and those entitled in remainder. *Barton's trusts*, Law Rep. 5 Eq. 238. And dividends declared before the decease of the testator, but payable afterwards, must be treated as capital, and not income. *De Gendre v. Kent*, Law Rep. 4 Eq. 283.

³⁶ *Price v. Anderson*, 15 Sim. 473; *Re Hopkin's Trusts*, 22 W. R. 687; s. c. L. R. 18 Eq. 696. See also note 35, ante, and cases cited. And a bequest of shares in a railway company will carry such shares as the testator may own of that description at his decease, although he had none such at the time of making his will. *Trinder v. Trinder*, Law Rep. 1 Eq. 695. As to the distinction between a bonus and regular income upon shares, see *Hollis v. Allan*, 12 Jur. n. s. 638; *Plumbe v. Neild*, 6 id. 529. Legatees of railway shares are entitled to elect out of all belonging to the testator which answer the description. *Jacques v. Chambers*, 2 Coll. C. C. 435; s. c. 4 Railw. C. 205; *Tanner v. Tanner*, 11 Beav. 69. A bequest of all the railway shares of which the testator shall be possessed at the time of his decease was held to pass such shares as were specifically named in the will, and of which the testator was possessed at the time of its date, although subsequently converted into consolidated stock by a resolution of the company. But shares of the same consolidated stock, purchased after the date of the will, and owned by the testator at his decease, were held not to pass. *Oakes v. Oakes*, 9 Hare, 666. But this case, so far as it attempts a distinction between "shares" and "stock" in a joint-stock company, is overruled by the Court of Chancery Appeal in *Morrice v. Aylmer*, 23 W. R. 221. Lord Chancellor Cairns here said, that railway stock is nothing more than paid-up shares, and that both will pass under a bequest of "shares." s. p. *Emery v. Wason*, 107 Mass. 507.

somewhat novel form, in a late case³⁷ before the English courts. The testator, at the time of his death, had certain shares in a joint-stock company, which he had specifically bequeathed. After his death the testator was found to be largely in debt to the company, and a suit was instituted by the company for the recovery of the same, which was settled by way of compromise, under the sanction of the court, and a large sum paid by the estate in liquidation of the claim of the company, out of which they declared a bonus or extra dividend. The case was heard before the Master of the Rolls, who decided that this bonus belonged to the general personal estate, and not to the specific legatees. Upon appeal and hearing before the Lord Justices, in the Court of Chancery Appeal, this decree was reversed, and the dividend awarded to the specific legatees.³⁸

* And in analogy to the foregoing rules, it is well settled, * 144 that the specific legatee of shares in a joint-stock company is bound to pay all calls actually made after the decease of the testator.³⁹ Where calls were ordered at successive periods, some of which had been demanded of the testator and others not, it was held, that the estate was only liable for the payment of such as had already been notified to the testator, and that the specific legatee must pay such as were actually demanded after the testator's decease, although voted before.⁴⁰

The terms "profits and dividends" in a contract were held to be limited to actual dividends made within the term defined, and not to embrace profits actually earned by the company, but not divided. *Hyatt v. Allen*, 56 N. Y. 553.

³⁷ *Maclaren v. Stainton*, 6 Jur. N. S. 360; s. c. 27 Beav. 460; *Lock v. Venables*, 27 Beav. 598; s. c. nom. *Loch v. Venables*, 6 Jur. N. S. 238.

³⁸ *Maclaren v. Stainton*, 7 Jur. N. S. 691. It was admitted in this case that the testator, who had for a long period been the general manager of the company, bequeathed the shares under the belief that he was not indebted to the company, and that the debt had been paid out of the general personal assets of the estate, which had thus supplied the source of the dividend. But in another case, where the testator died a few days after the dividend was declared, but before it was payable, having specifically bequeathed the shares, it was decided that the bonus belonged to the estate, on the ground that it accrued before the death of the testator. *Lock v. Venables*, 27 Beav. 598.

³⁹ *Day v. Day*, 6 Jur. N. S. 365.

⁴⁰ *Addams v. Ferick*, 26 Beav. 384. But where there was a gift of the residue of an estate for life, and then over, part of the property consisting of shares not fully paid up, it was said that although as a general rule the specific legatee of such stocks would be held to pay calls made after the testator's

21. It seems to be universally conceded that a devise of real estate is always to be regarded as specific, whether the estate is specifically described, or only in general terms and by reference to other facts and documents.⁴¹ And the same rule holds good as to the bequest of all leases and other chattels real. They are considered in the nature of real estate out of which they issue.⁴²

* 145 * 22. A distinction is made between legacies out of the issues of real estate, whether resulting from sale or otherwise, and legacies merely chargeable upon real estate. In the former case it has been regarded the same in effect as a devise of a specific proportion of the real estate, and consequently as creating a specific devise, the same as if a portion of the estate itself had been devised.⁴³ But legacies merely charged upon real estate do not become specific legacies, any more than if charged upon stocks or some other personal fund. They are merely demonstrative legacies in all such cases; and although they thereby acquire a prior

death, the rule will not apply where there is an intention to be collected from the form of the will that no severance shall take place during the continuance of the life-estate. *Box In re*, 9 Law T. N. S. 372.

⁴¹ 1 Roper, 194; *Forrester v. Leigh*, Amb. 171, 173.

⁴² *Oneal v. Mead*, 1 P. Wms. 693; *Long v. Short*, id. 403; *Rudstone v. Anderson*, 2 Ves. Sen. 418; 1 Roper, 194, and other cases there referred to; *Mayott v. Mayott*, 2 Br. C. C. 125. The same rule substantially obtains in the American courts. Thus the devise "of the balance of my real estate, believed to consist of lots numbered six," &c., was held to be specific. *Walker v. Parker*, 13 Pet. U. S. 166. And where the testator directed that any deficiency in his estate, whereby it should prove insufficient to answer all the legacies and annuities given, should be made up from the residuary bequest and from a general legacy given the same person, it was held that this applied as well to deficiencies occurring from losses after the decease of the testator, by reason of the bankruptcy of the executor, as to any such deficiency existing at the testator's decease. *Silsby v. Silsby*, 3 Cranch, 249. And it seems to be equally well settled that a devise of real estate by operation of the residuary clause will be none the less specific; and accordingly where two estates were subject to a mortgage, and one was specifically devised, and the other passed by the residuary clause, it was held that both estates were equally and ratably holden for the mortgage. *Gibbins v. Eyden*, L. R. 7 Eq. 371; s. c. 17 W. R. 481. But it may be questioned whether this decision should not be limited to questions between different mortgagees. *Post*, *Settlement of Estates, Marshalling Assets*.

⁴³ *Creed v. Creed*, 11 Cl. & Fin. 491 (s. c. before Sir *E. Sugden*, Chancellor of Ireland, 1 Dr. & W. 416), where the decree was reversed by the House of Lords, and that of Lord *Plunkett* affirmed. *Ante*, § 6, pl. 12.

right to payment out of the estate charged for that purpose, they are not adeemed by the disposition of that fund during the life of the testator, or by it proving inadequate to the full payment of the legacy.⁴⁴

23. Thus in *Mann v. Copland*,⁴⁵ where the testator gave £10 annually to his servants, by name, during his natural life, to be "paid out of the rents arising from a certain estate," &c., it was held not to be so far specific as to depend exclusively upon such rents, but only as a charge upon them. The Vice-Chancellor, Sir *Thomas Plumer*, said: "It is not so specific and so connected with the fund as to fail if there is no such fund, it appearing there was a fixed, independent, separate, distinct intent to give the legacy; the particular property out of which it was to be paid being a secondary thought."

24. Thus it appears, from the above as well as from most of * the cases upon the subject,⁴⁶ that in cases of a * 146

⁴⁴ Lord *Cottenham* in *Creed v. Creed*, 11 Cl. & Fin. 491. His lordship said, "General legacies do not become specific, because they are payable out of the proceeds of real estate; but the gift of the proceeds of the sale of real estate may be specific, as in *Page v. Leapingwell*, 18 Vesey, 463. So the charge of legacies upon the real estate does not make them specific, although the annuities payable and issuing out of them are so." His lordship here held that the annuities were specific gifts "out of the real estate, and that the legacies were not."

⁴⁵ 2 Madd. 223.

⁴⁶ 1 Roper, 192. "It is necessary that the intention be either expressed in reference to the thing bequeathed, or otherwise clearly appear from the will, to constitute the legacy specific." The indication of intention must be clear to make a legacy specific. *Smith v. Lampton*, 8 Dana, 69. *Morton, J.*, in *Briggs v. Hosford*, 22 Pick. 288, 289: "The court always leans against specific legacies, as being less consonant to reason and justice than general ones." *Chaworth v. Beech*, 4 Vesey, 555; *Innes v. Johnson*, 4 Vesey, 568; *Kirby v. Potter*, 4 Vesey, 748; *Mayrant v. Davis*, 1 Desaus. 202; *Cogdell v. Cogdell's Heirs*, 3 Desaus. 346; *Warren v. Wigfall*, 3 Desaus. 47; *Cuthbert v. Cuthbert*, 3 Yeates, 486. A bequest of all my stock in the Housatonic Bank, amounting to \$6,000, the testator having that amount at the date of the will, but having \$9,000 of the same stock at the time of his decease, was held to be a specific bequest of what the testator had at the time of making his will. *Foote, Ex parte*, 22 Pick. 299; *White v. Winchester*, 6 Pick. 48; *Ashburner v. Macguire*, 2 Br. C. C. 108; *Jeffreys v. Jeffreys*, 3 Atk. 120. So uniformly has this principle been pursued by the courts, and such persevering efforts have been made by all courts, to maintain all legacies which the testator evidently intended to have paid, without reference to the sufficiency of the fund

doubtful character, where it is not easy to determine whether
 * 147 a specific legacy is * created or not, it is referred to the

charged, that scarcely an exceptional case will be found. *Savile v. Blacket*, 1 P. Wms. 777; *Fowler v. Willoughby*, 2 Sim. & Stu. 354; *Campbell v. Graham*, 1 Russ. & My. 453; *Livesay v. Redfern*, 2 Yo. & Coll. Ex. 90. See also *Balliet's Appeal*, 14 Penn. St. 451, 461; *Walls v. Stewart*, 16 Penn. St. 275, 281; *Bradford v. Haynes*, 2 Appleton, 105.

A bequest to one person of a certain number of bank-shares of a particular bank, and to another person a certain number of the shares of the same bank, the testator owning, at the time, the precise number of shares in that bank thus bequeathed to both legatees, but not referring to that fact, or intimating in any specific language of the will an intention to give the particular shares then owned by him, creates a general and not a specific legacy. *Tift v. Porter*, 8 N. Y. 516. The rule is here declared, that a legacy is general and not specific, unless by its terms it indicates a particular part of the testator's estate as the subject of the bequest. The learned judge, Mr. Justice *Johnson*, here declares, that the case of *Everitt v. Lane*, 2 Ired. Eq. 548, where it was held that the gift of "one carriage" to the testator's wife, he having but one, must be construed as a specific bequest of that carriage, is not founded upon a sound view of the law; and concludes, that such is the present inclination of the courts against making legacies specific, and thus dependent upon the testator continuing up to the time of his decease to retain the same specific chattel, that, "to make a legacy specific, its terms must clearly require such a construction." This view may be sound, although going somewhat beyond most of the modern cases. But we think, in most cases, like that of *Everitt v. Lane*, supra, if the testator had disposed of the carriage owned at the date of the will, and procured another before his decease, it would be regarded as reasonable to allow the bequest to carry the one last owned by the testator, he having but one at the same time. And we cannot say that making such a bequest mean *a* carriage, instead of *the* carriage, would not be more in accordance with the probable intent of the testator, in a case where, from any cause, he should happen to have no carriage at the time of his decease, than the opposite view. The question is here very carefully reviewed, and ably discussed, both by Mr. Justice *Johnson* and Mr. Justice *Willard*, who gave a dissenting opinion. One thousand dollars out of money in the safe-keeping of A. B., being in lieu of dower, was held to be so far in the nature of a specific legacy, as to carry interest from the decease of the testator. *Parkinson v. Parkinson*, 2 Bradf. Sur. Rep. 77. See also *Pierrepont v. Edwards*, 25 N. Y. 128; *Ludlam's Estate*, 13 Penn. St. 188. Where the testator, during his life, gave certain slaves by name to A. his son, and certain other slaves by name to his son B., and by his will gave the slaves by name to B. which he had given to A., and vice versa, stating that he had before given them the same slaves now given by his will, it was held that the will must be construed as intended to confirm the gifts made before, and not to transfer the gift of one to the other as expressed in the specific words. In other words, the general terms were permitted to control those more specific. *Lowe v. Carter*, 2 Jones, Eq. 377. A devise of shares of a particular stock, unless

intention of the testator. And where it is said, as it is in many of the cases, that the courts *incline against treating * 148 bequests as specific, all that is meant is, that the courts naturally feel a reluctance to have a provision intended obviously

there is something more by which to infer that particular shares were intended, will commonly be construed a general legacy. *Simmons v. Vallance*, 4 Br. C. C. 345; *Wilson v. Brownsmith*, 9 Vesey, 180; *Robinson v. Addison*, 2 Beav. 515. But *Avelyn v. Ward*, 1 Ves. Sen. 420, held a bequest to trustees of £2,000 in the stock of the South Sea annuities to be specific. (*Pearce v. Billings*, 10 R. I. 102.) The case from Vesey has been doubted. 1 Roper, 208, 209. But Lord *Thurlow* seems to have entertained a similar opinion, upon similar facts, in *Stafford v. Horton*, 1 Br. C. C. 482. And if the testator have the shares at the date of the will, and hold the same at his death, that seems the more natural construction. But a bequest to invest in government securities a certain amount will create only a general legacy. *Gibbons v. Hills*, 1 Dick. 324; *Sibley v. Perry*, 7 Vesey, 523; *Raymond v. Brodbelt*, 5 Vesey, 199. But where the testator gave £10,000 three per cents, and directed his executors to make up the deficiency if he should not leave sufficient, but he left £70,000, it was held to be a specific and not a general legacy. So a direction to the executor to draw testator's bank-stock from the bank, amounting to £600, and divide it equally among certain persons, will not create specific legacies. *Taylor v. Martindale*, 12 Sim. 158. But slight variations from the above will often induce courts to construe a legacy specific or demonstrative, as the case may be. *Stanley v. Potter*, 2 Cox, 180; *Lambert v. Lambert*, 11 Vesey, 607. It becomes mainly a question of intent, whether the testator intended to restrict the claim of the legatee to the whole or a portion of certain funds. And this is sometimes controlled by the consideration, that, unless the legacy is held to be general, it will fail. *Bronsdon v. Winter*, Ambler, 57; *Warren v. Postlethwaite*, 2 Coll. C. C. 108; *Auther v. Auther*, 13 Sim. 422; *Queen's College v. Sutton*, 12 Sim. 521; *Davies v. Morgan*, 1 Beav. 405; *Nelson v. Carter*, 5 Sim. 530; *Sleech v. Thorington*, 2 Ves. Sen. 560; *Jeffrey's Trusts*, Law Rep. 2 Eq. 68; *Disney v. Crosse*, Law Rep. 2 Eq. 592; *Hodges v. Grant*, 4 id. 140; *Ford v. Fleming*, 1 Eq. Cas. Ab. 302. But where the legacy is clearly specific, it must be so held, even where it has been adeemed. *Rider v. Wager*, 2 P. Wms. 329. And see *Smith v. Fitzgerald*, 3 V. & B. 2. See also *Kampf v. Jones*, 2 Keen, 756; *Choat v. Yeats*, 1 Jac. & W. 102; *Knight v. Davis*, 3 My. & K. 358; *Attorney-General v. Bury*, 1 Eq. Cas. Ab. 201, pl. 12; *Hayes v. Hayes*, 1 Keen, 97; *Cockran v. Cockran*, 14 Sim. 248.

The same general rules above stated have been recognized in the American courts. Thus a bequest of stock or shares of any kind will be held a general legacy, unless there is something to show that it was intended to apply to what the testator held at the date of the will. *Davis v. Cain*, 1 Ired. Eq. 304. General legacies, made in substitution for specific legacies adeemed by the testator, subjected to the same contribution imposed upon the original legacies. *Hammond v. Hammond*, 2 Bland. Ch. 306. See also *Sparks v. Weedon*, 21 Md. 164.

by the testator to have been effective, and especially where it is made on behalf of a child, or any person naturally dependent upon him, fail through any merely accidental circumstance not anticipated by him. When, therefore, the court clearly perceive an intention on the part of the testator to have the legacy paid at all events, and some unexpected contingency has occurred, whereby the fund referred to for its payment has failed, or is likely to become deficient, it is natural and proper to give the words of the will such a construction as will render the bequest general, or demonstrative, instead of specific, so far as that can be done consistently with the natural and primary import of the words.

25. In some cases legacies are charged so exclusively upon real estate, that the personal estate is held not liable for their payment. This, in the early cases, was held only to result from an express declaration to that effect. But it is now well settled, that the exoneration of the personal estate from the payment of legacies, for which it is the primary fund, may be effected in any mode which shows a plain intention on the part of the testator to do so.⁴⁷

26. Questions often occur as to how far a residuary bequest is to be regarded as specific. It is certain that a bequest of all a man's personal estate is not a specific but a general legacy.⁴⁸ But * 149 it has * been held that a bequest of all the testator's personal estate, at a particular place, is a specific legacy; and, if there is a deficiency of assets to meet other legacies, this will not abate on that account.⁴⁹ So a bequest of all the residue of the testator's estate in the Island of Jamaica is specific;⁵⁰ so also of

⁴⁷ *Dickin v. Edwards*, 4 Hare, 273; *Hancox v. Abbey*, 11 Vesey, 179. Sir *William Grant*, M. R., said here, and in *Watson v. Brickwood*, 9 Vesey, 447, "That it might have been better, if what I understood to have been the old rule had been adhered to, that nothing but express words should operate the exoneration of the proper fund." The executor, not expressly charged therewith, has no official duty in regard to annuities charged on land; and it is his duty to apply the personalty in payment of the other pecuniary legacies. *Robinson's Ex'rs v. McIver*, 63 N. C. 645.

⁴⁸ 2 Wms. Ex'rs, 1054; 1 Roper, Leg. 215. So a gift "of all my real estate, personal property, houses, furniture," &c., to the testator's widow for life, and after her death the property remaining "I request to be divided among my surviving children," naming those then living, creates a general and not a specific bequest. *Calkins v. Calkins*, 1 Redf. Sur. Rep. 337.

⁴⁹ *Sayer v. Sayer*, 2 Vern. 688; s. c. Prec. in Ch. 392.

⁵⁰ *Nisbett v. Murray*, 5 Vesey, 149; *Robinson v. Webb*, 17 Beav. 260.

all the testator's goods and chattels in a particular county ;⁵¹ and so of all plate, linen, and furniture, in my house at A., or which shall be there at the time of my decease.⁵² Vice-Chancellor *Wigram* said, in *Pickup v. Atkinson*,⁵³ "a general residuary clause is not the less general because it contains an enumeration of some of the particulars of which it may consist."

27. It has sometimes been held that a bequest of certain enumerated articles and of all the residue of the testator's estate, when expressed in different sentences, and in such a manner as to be entirely separable, might be fairly regarded as two separate bequests, the former being specific, and the latter general and residuary.⁵⁴ But in general, where there is nothing to characterize the bequest, as any thing but a residuary bequest, with a partial enumeration of the articles of which it consists, it has been treated as one entire bequest, and of a general or residuary character.⁵⁵ And where the testatrix, after making two specific bequests of sums in the long annuities, gave the residue of her property, all she did or might have in the funds, copy or leasehold estates, to her sisters during their lives, and the testatrix's property, after satisfying the specific legacies, consisted in part of £150 per annum in the long annuities, *Sir C. C. Pepys*, M. R., held that as to the copyhold or * leasehold estates, there being no question but they * 150 were specific, it might with equal propriety be regarded as specific as to the funds, and decreed accordingly.⁵⁶

⁵¹ *Moore v. Moore*, 1 Br. C. C. 127, 129, and notes.

⁵² *Gayre v. Gayre*, 2 Vern. 538.

⁵³ 4 Hare, 624, 628. *Sir J. L. Knight Bruce*, V. C., in *Sutherland v. Cooke*, 1 Coll. C. C. 498, 502. A bequest of all the testator's goods in a particular room is specific. *Moore v. Moore*, 1 Br. C. C. 127. And it has been held in some of the American cases, that a bequest of the whole personal estate of the testator, or of the residue thereof after deducting specific legacies, is a specific legacy. *Warley v. Warley*, 1 Bailey, Eq. 397; *Godard v. Wagner*, 2 Strobb. Eq. 1. And in one case where certain articles were specifically enumerated, and "all the estate not before devised" added, it was held not to amount to a general residuary devise, but only to carry property of the same kind as that enumerated. *Minor v. Dabney*, 3 Rand. 191.

⁵⁴ *Clarke v. Butler*, 1 Mer. 304.

⁵⁵ *Taylor v. Taylor*, 6 Sim. 246.

⁵⁶ *Bethune v. Kennedy*, 1 My. & Cr. 114. But this is not regarded as, strictly speaking, a specific legacy. 2 Wms. Ex'rs, 1058, and note. See also *Pickering v. Pickering*, 4 My. & Cr. 289; *Hubbard v. Young*, 10 Beav. 203; *Harris v. Poyner*, 1 Drew. 174.

28. It is a general rule of the English courts of equity, where personal property is bequeathed for life with remainder over, and the bequest is not specific in its terms, and there is nothing in the will to show the expression of an intention or preference that the tenant for life shall enjoy the specific property left, and in the form in which it is left, to convert it into three per cents, subject, in the case of a real security, to an inquiry whether it will be for the benefit of all parties; and the tenant for life is entitled to hold only upon that principle.⁵⁷ This rule is called "the rule in *Howe v. Lord Dartmouth*," having been acted upon in that case, although not originating there.⁵⁸

⁵⁷ *Howe v. Earl of Dartmouth*, 7 Vesey, 137. See also *Dimes v. Scott*, 4 Russ. 195; *Alcock v. Sloper*, 2 My. & K. 699; *Crawley v. Crawley*, 7 Sim. 427; *Mills v. Mills*, id. 501.

⁵⁸ 2 Wms. Ex'rs, 1058; *Pickering v. Pickering*, 4 My. & Cr. 289, 298. The learned judge here said: "All that *Howe v. Lord Dartmouth* decided—and that was not the first decision to the same effect—is, that where the residue or bulk of the property is left en masse, and it is given to several persons in succession, as tenants for life and remainder-men, it is the duty of the court to carry into effect the apparent intention of the testator. How is the apparent intention to be ascertained if the testator has given no particular directions? If, although he has given no directions at all, yet he has carved out parts of the property to be enjoyed in strict settlement by certain persons, it is evident that the property must be put in such a state as will allow of its being so enjoyed. That cannot be unless it is taken out of a temporary fund and put into a permanent fund. But that is merely an inference from the mode in which the property is to be enjoyed, if no direction is given as to how the property is to be managed. It is equally clear that if a person gives certain property specifically to one person for life, with remainder over afterwards, then although there is a danger that one object of his bounty will be defeated, by the tenancy for life lasting as long as the property endures, yet there is a manifestation of intention which the court cannot overlook."

"If a testator gives leasehold property to one for life, with remainder afterwards, he is the best judge whether the remainder-man is to enjoy. The intention is the other way, so far as it is declared, and the terms of the gift, as a declaration of intention, preclude the court from considering that he might have meant that it should be converted."

In *Morgan v. Morgan*, 14 Beav. 72, Sir *John Romilly*, M. R., said: "Where property of a perishable nature is given to be enjoyed in succession, the object of the testator can only be effected by converting the property into permanent annuities, and giving each person in succession the dividends of the fund." See also *Hinves v. Hinves*, 3 Hare, 609, where Vice-Chancellor *Wigram* says, "The court has leant against conversion, as strongly as is consistent with the supposition that the rule itself is well founded." See also *Mackie v. Mackie*, 5 Hare, 70, 77.

But notwithstanding the inclination of the English courts against this rule

* 29. From the view of the law presented in the last case * 151 referred to, it is apparent that where there is any thing in the will from which it may fairly be inferred that the testator expected the tenant for life to enjoy the property specifically, it cannot be converted into money or public funds, but the remainderman must take his chance of any thing remaining after the termination of the life-estate. And where the devise is specific, this is always to be so understood.⁵⁹

* 30. It seems scarcely necessary to go much into detail * 152 in regard to the American cases as to specific legacies. They profess to pursue the principles already indicated in the English cases. Any bequest limited to a particular debt or chattel,

of converting perishable property into a permanent fund, producing such an annuity as the funds will purchase during the continuance of the several successive lives to which it is bequeathed, the rule must still be regarded as eminently just and highly convenient, as an instrument for carrying into effect the probable intention of the testator; and it still maintains its ground in the English courts. See *Crowe v. Crisford*, 17 Beav. 507; *Marshall v. Bremner*, 2 Sm. & Gif. 237; *Blann v. Bell*, 5 DeG. & Sm. 658; s. c. 2 DeG., M. & G. 775; *Murton v. Markby*, 18 Beav. 196; *Hood v. Clapham*, 19 Beav. 90; *Jebb v. Tugwell*, 20 Beav. 84. The rule of law just stated may exist here; but we have not known of any case of conversion of a fund for a similar purpose by order of an American court. And from the far greater uncertainty of investments and the greater difficulty of procuring annuities readily and from a responsible source, we should not expect the courts of equity in this country to act upon the rule, for the present at least.

⁵⁹ *Collins v. Collins*, 2 My. & K. 703. See note 58, ante. But in *Smith v. Pugh*, 6 Jur. 701, where household furniture and farming stock were given in trust, with directions to the trustees to let the testator's wife enjoy the same during her natural life, and after her decease to divide it equally between his son and daughter; and the trustees allowed the wife to have the possession and use of the same during her life, whereby the same were ultimately lost; it was held, the trustees should have converted the property into money, and only paid the widow the interest during her life, and that they were therefore responsible to the children for the value of the articles. But it seems to us very questionable how far any such rule would be adopted in this country. It would seem more natural and more in accordance with the probable intent of the will to allow the widow the specific use of the articles, and for those entitled in remainder to run the chance of what might remain after the termination of her estate. But, as elsewhere stated, leaseholds devised for life, with remainder over, must ordinarily be converted into money. *Chambers v. Chambers*, 10 Jur. 326, 15 Sim. 183. But where one is given the "full and entire enjoyment" for life, this means *in specie*. *Harvey v. Harvey*, 5 Beav. 134.

as the amount to be recovered in a certain suit,⁶⁰ or the avails of a certain bond and mortgage, is specific.⁶¹ But it was held, reversing the judgment of the Supreme Court,⁶² that the bequest of \$1,200 and interest on the same, contained in a bond and mortgage described in the will, with a subsequent provision importing that the same is given to the legatee for life, with a limitation over, is not a specific, but a demonstrative legacy, giving the income of \$1,200 during the life of the legatee; and the same is not adeemed by the assignment or extinction of the bond and mortgage during the life of the testatrix.

31. The precise and specific changes which will have the effect to adeem a specific legacy it is not easy to define, by any such ready and infallible tests as will be intelligible, and at the same time applicable, to all cases. And the cases upon this point do not seem entirely reconcilable with each other. The question is considered to some extent under the title of Ademption.⁶³ And the analogies of the subject were considered somewhat extensively in the former portion of this work, with reference to the revocation of devises of real estate by alteration of the estate.⁶⁴ The question was examined, at an early day, by the most distinguished of the American equity judges.⁶⁵ It may be stated, as the gen-

⁶⁰ *Chase v. Lockerman*, 11 G. & J. 185; *Gilbreath v. Winter*, 10 Ohio, 64.

⁶¹ *Gardner v. Printup*, 2 Barb. Sup. Ct. 83.

⁶² *Giddings v. Seward*, 16 N. Y. 365. See also *Walls v. Steward*, 16 Penn. St. 275, 281. A bequest of all the testator's right, interest, and property, in thirty shares in the Bank of the United States of America, is a specific legacy. *Walton v. Walton*, 7 Johns. Ch. 258.

⁶³ *Post*, § 27.

⁶⁴ *Ante*, vol. 1, § 26.

⁶⁵ *Kent*, Chancellor, in *Walton v. Walton*, 7 Johns. Ch. 258, where the following points are declared: "Where, before the testator's death, the charter of the United States Bank expired, and all its property and funds were conveyed to trustees, who divided the funds received by them from time to time among the stockholders, and the testator received the dividends on the shares devised, but did not sell or dispose of the shares, — held, that this was an ademption of the legacy pro tanto only, and the legatee was entitled to any dividends after the testator's death; the variation in the testator's interest in the stock or fund, by operation of law, not being any extinguishment or ademption of the legacy. So where two shares in the Western Inland Lock Navigation Company were bequeathed to the plaintiff, and in the lifetime of the testator, the shares, by some arrangement, were increased to the number of six, and the stock, under an act of the legislature, became vested in the state, and a certain

eral rule * upon the subject, that where the estate in, or the * 153 title to, the thing specifically bequeathed, is essentially changed, the legacy will be adeemed. The essential identity of the thing must continue, and so also of the testator's title and interest in it, up to the time of his decease, in order to have the specific bequest take effect. After that the legatee will acquire perfect title, according to the terms of the bequest, unless the same is required to meet the claims of creditors, either by way of special incumbrance or general lien.

32. The rights of specific legatees, of goods and chattels in remainder, against those entitled for life, may sometimes become important to be known. It was formerly the practice in equity to require of the tenant for life security, that the property thus bequeathed should not be unnecessarily deteriorated while it remained in his possession, and be ready at his decease to pass to him entitled in remainder, in the same state and condition as when delivered to the tenant for life, ordinary wear and decay only excepted.⁶⁶

33. But the rule was abandoned at an early day, and in the language of Lord *Thurlow*, in *Foley v. Burnell*,⁶⁷ "the cases as to tenant for life giving security for the goods have been overruled, and the court now demands only an inventory of the tenant for life, which is more equal justice, since there ought to be danger in order to require security." In the language of Mr. Justice *Story*,⁶⁸ "the modern rule is, not to entertain such a bill [that is, to obtain security of the tenant for life] unless there be some * allegation and proof of waste, or of danger of waste, of the * 154 property. Without such ingredients the remainder-man is

sum was to be paid to the stockholders, as a compensation for its value, — held, that the legacy was not adeemed or extinguished." So also the bequest of a sum of money, "to be kept in gold and silver and paid to the legatee at full age," is not a specific legacy. *Mathis v. Mathis*, 3 Harr. 59. See also *Enders v. Enders*, 2 Barb. Sup. Ct. 362.

⁶⁶ *Aston v. Aston*, 2 Vern. 452, 453. This case is commonly cited to this point, but it was in fact the case of a bequest to become void upon the non-performance of a condition subsequent, i. e., if the legatees married without consent of their mother, which is a case where there might be more than ordinary propriety in requiring security not to violate the condition upon which the bequest was made, and, if not performed, to restore the bequest to the executor or legatee in remainder. But there is no question that the same practice extended to cases of tenants for life and remainder-men of personal chattels.

⁶⁷ 1 Br. C. C. 275, 279.

⁶⁸ 1 Eq. Jur. § 604.

only entitled to have an inventory of the property," so that he may be able to identify it, and compel a delivery when his right accrues. The same rule is maintained in the American courts.⁶⁹

34. There has been considerable discussion in the courts how far a bequest of leaseholds in remainder by way of executory devise is defeated by a renewal of the lease in the time of the tenant for life, the existing lease at the decease of the testator having expired, and being renewed by virtue of a clause of renewal contained in the original lease. The case would seem very obvious, upon principle, that a renewal, which was provided for in the subsisting lease, at the date of the will, must, of necessity, be regarded as a mere continuance of the original interest and estate of the testator. And the cases have adopted this view even in the case of leases containing no express clauses for renewal.⁷⁰

35. And the same rule has been extended to the case of a tenancy from year to year being so bequeathed, and the tenant for life accepting a lease for a term of years.⁷¹

36. The fine and all other charges paid by the tenant for life, as the cost of the renewal of the lease, will be chargeable upon the tenant in remainder, in proportion to his interest.⁷² This question, and others arising out of the renewal of leases so bequeathed, is extensively discussed by Mr. Roper,⁷³ but it is not matter of sufficient practical importance here to justify taking more space.

37. Where a specific legacy is charged with the payment of debts, this will exonerate the residue of the estate from that charge to the extent of the specific bequest.⁷⁴

38. Where the testatrix bequeathed several sums of her bank-stock to several persons, being part of her £9,000 like stock, and all the residue of her said bank-stock to C., and the stock at her decease was insufficient to pay the specified sums, it was held that all the legacies, including the residue to C., must abate in

⁶⁹ *Walworth*, Chancellor, in *Covenhoven v. Shuler*, 2 Paige, 122, 132; post, *Executory Bequests*, § 17, pl. 25, 26; *Howland v. Howland*, 100 Mass. 222; *Bromley v. Kelly*, 18 W. R. 374.

⁷⁰ *Taster v. Marriott*, Amb. 668; *Rawe v. Chichester*, id. 715; *Pickering v. Vowles*, 1 Br. C. C. 197.

⁷¹ *Doe v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Vesey, 383, 395.

⁷² *White v. White*, 9 Vesey, 554.

⁷³ 1 *Legacies*, 318, 328. See post, *Legacies Vested and Contingent*, § 16.

⁷⁴ *Webb v. De Beauvoisin*, 31 Beav. 573.

*proportion.⁷⁵ This view may do better justice than to *155 have visited the whole loss upon the residuary legatee of the fund; but it does not seem entirely in consonance with the general current of the decisions, to treat the residuary legatee as only standing upon the same ground as those whose shares are specifically defined, merely because, the fund being definite, the share intended to fall to him is susceptible of computation. In such cases it is certain the testator did not intend to place all upon the same footing, else they would have been named in a similar mode, as entitled each to a certain amount, and not one to the remainder. The residue is what shall remain, after the specific deductions named, and nothing more; and to construe it as was here done is to put other words into the testatrix's mouth, which we may conjecture she would have used if she had known what has since transpired, but which in fact she did not use. In saying this we recognize fully the fact that the courts do not make any distinction between legacies given in the early portion of the will from these given in the after-portions of the instrument, unless there is something to indicate a purpose on the part of the testator, that one class shall be first paid to the exclusion of the other; otherwise all general legacies stand upon the same footing, notwithstanding the probable ground of conjecture that the testator, had he anticipated a deficiency to pay the whole, might have omitted those last named rather than the others. Unless there is some clear ground of discrimination, all legacies expressed in similar terms will stand upon the same basis as to the order of payment.⁷⁶ But we do not think this rule can upon principle be applied to a gift of the residue of a specific fund even, but such seems to be the rule in England.⁷⁷

⁷⁵ *Elwes v. Causton*, 30 Beav. 554.

⁷⁶ *Nickisson v. Cockill*, 8 L. Times, N. S. 778, before the Lord Chancellor; s. c. 9 Jur. N. S. 372. A testator is presumed to consider that there will be assets sufficient to pay all annuities and legacies given in his will, and to expect them to be paid equally. *Street v. Street*, 8 Law T. N. S. 306, before Vice-Chancellor *Wood*. And it is not sufficient to rebut this presumption that the legacies are given to several persons, with reference to successive residues interposed between the gifts. *Ib.*

⁷⁷ *Wright v. Weston*, 26 Beav. 429. In the recent case of *Clark v. Clark*, 11 Jur. N. S. 820, before Vice-Chancellor *Stuart*, it was held, that when one estate was specifically devised to A., and another to B., and a third passed

* 156 * 39. An action at law lies against the executor to recover a specific legacy, after his assent to the same, and that it is not requisite to pay debts.⁷⁸ And it is the duty of the executor to preserve a specific legacy for the legatee ; and he cannot apply it in payment of debts, except from strict necessity.⁷⁹ And a specific legacy cannot be taken in execution for the debt of the testator.⁸⁰

40. Where the subject-matter of a specific legacy is pledged or any lien created upon it by the testator, either before or after the bequest, the legatee will be entitled to have it exonerated from such lien by the executor ; and even where the same has been sold to satisfy the lien, it has been held that the legatee is entitled to compensation.⁸¹

SECTION VIII.

LAPSED LEGACIES.

1. Definition of lapse, whether before or after the death of testator.
2. The use of the word "heir," "executor," &c., in addition to that of legatee.
3. Cases where the testator and legatee die by the same calamity.
4. The presumption is against the testator intending to give to the heir, executor, &c., where he merely names them.
5. The same rules apply where the will forgives a debt, as a legacy.
6. The principle of the distinction is, whether the testator directs the debt discharged, at all events.
7. To prevent a lapse, the testator must declare who shall take.
8. This rule enforced in the early cases, but relaxed in later ones.
9. Parol evidence not admissible to show intention of testator.
10. An intervening life-estate will refer provision against lapse to the period after death of testator.
11. The same rule of construction is applied where the payment of a legacy is postponed.
12. Gift to one or heirs, &c., held generally to prevent a lapse.
13. A legacy by way of trust will not lapse by the death of the trustee.
14. A legacy depending upon testamentary appointment may lapse, the same as any other.

under the residuary clause, they must all contribute ratably to the payment of the debts, on the ground that the latter was none the less a specific devise because it passed under the residuary clause.

⁷⁸ Doe v. Guy, 3 East, 120.

⁷⁹ Clarke v. Ormonde, Jacob, 108.

⁸⁰ Lyon v. Vick, 6 Yerg. 42.

⁸¹ Bothamley v. Sherson, 23 W. R. 848.

15. Bequest depending upon contingency may lapse.
16. How legacies to the uses of the will of another may lapse.
17. Survivorship saves lapse among joint tenants, but not among tenants in common.
18. Husband and wife take differently under wills from any other two persons.
19. Devise or bequest to a class will not lapse so long as one of the class survives.
20. Bequest to executors will generally go to the survivors.
21. It will make no difference at what time the class is ascertained as to the survivors taking.
22. How far the devise of the legal estate vests the fee absolutely in the trustee.
23. An estate will not lapse because an intervening estate upon which it depends lapses.
- * 24. How land devised subject to a charge which fails is to be disposed of. * 157
25. Whether the benefit of the estate failing shall go to the devisee of the residue or the heir.
- n. 56. Cases where the failure has operated for the benefit of the heir.
26. Cases where the failure has operated for the benefit of the devisee of the residue.
27. By the present English statute, such lapse operates for the benefit of the residuary devisee.
28. Legacies charged on land will lapse if the legatee die before time of payment, unless deferred to accommodate estate. *Quære?*
29. Held, in Pennsylvania, that legacies given to one, and in case of his death to another, if the first die in life of testator, the alternative gift takes effect.
30. Question of survivorship among joint legatees discussed by Mr. Justice *Metcalf*.
31. Several American cases stated.
32. The legatee in remainder takes a vested interest at the decease of the testator.
33. Contingent legacies lapse by death of legatee before the contingency.
34. Where there is no residuary bequest, lapsed legacies go to the next of kin.
35. Legacy will not lapse by reason of the death of trustee; effect of condition in regard to lapse.
36. In some states, the share of a child who dies before the testator treated as undisposed of.
37. In some cases, legacies fail by reason of being combined, and one being void and the others not ascertainable.
38. Abated legacies entitled to benefit of lapse.

§ 8. 1. THE general rule is well settled, that, where the legatee dies before the testator, the legacy will lapse.¹ And there are some cases where the legatee survives the testator, that the legacy will nevertheless fail to become operative, on the ground of some

¹ Swinb. pt. 7, § 23, pl. 1; 2 Wms. Ex'rs, 1084. Swinburne defines the rule, "If the legatary die before the day (of the death of the testator), the legacy is void: neither can the executors or administrators of the legatary demand the same." This is obvious from the fact that the will does not become operative until the death of the testator. So too a legacy to a charitable institution, which was dissolved in the testator's lifetime, lapses. *Fisk v. The Attorney-General*, Law Rep. 4 Eq. 521.

contingency upon which the vesting of the legacy is made to depend. Where the legacy never vests, it is properly regarded as having lapsed, whether the event occur before or after the death of the testator.

2. The most numerous class of lapsed legacies is undoubtedly that where the legatee predeceases the testator; but questions of more difficulty often arise, under the head of legacies lapsed before the period of vesting occurs, notwithstanding the legatee survive the testator. But if the legatee predecease the testator, the legacy will lapse, notwithstanding the will contain the words "heirs, executors, administrators," &c., as these words are prima
* 158 * facie to be regarded only as words of limitation, calculated to describe the nature of the estate given to the legatee or devisee, and not as used with any express purpose of preventing a lapse in the bequest, where the legatee should happen to die before the testator.²

3. Where the testator and the legatee, in contemplation of law, die precisely at the same time, there is no vesting of the legacy. There was, by some of the early writers, and in some of the cases upon the point, considerable discussion in regard to presumptions of survivorship arising out of the facts and circumstances of the case, such as sex, age, and general health. But it seems to be now settled, that by the law of England the question of survivorship, in cases of this character, is matter of evidence, and depends upon the presumptions of fact, and that, in the absence of all evidence upon the point, there is no conclusion of law upon the subject. A case of considerable importance occurred in the English courts, so lately as the year 1854, where the subject was extensively discussed, both at the Rolls and in the Court of Chancery Appeal.³

² Ante, §§ 4, 5. In these sections we have incidentally illustrated the point whether the words "heir," "executor," "next of kin," &c., are used by way of limitation of the estate, or to create a new and distinct estate in the representative of the ancestor or legatee.

³ *Underwood v. Wing*, 19 Beav. 459; s. c. 4 DeG., M. & G. 633; post, *Sett. Estates*, § 1, n. 1. In some of the Continental countries in Europe, as in France for instance, there are positive enactments, by which the question of survivorship in certain contingencies is determined as a presumption of law. This case was heard before the Lord Chancellor, Lord *Cranworth*, and two common-law judges, whom his lordship had desired to sit with him, Mr. Justice *Wightman* and Mr. Baron *Martin*. In the opinion of the learned judges,

* The testator bequeathed personal estate to his wife, and, * 159
in the event of her dying during his life, to A. B., upon certain trusts, which failed; and after that he bequeathed his whole

it is said, "The question of survivorship is the subject of evidence to be produced before the tribunal which is to decide upon it, and which is to determine it, as any other fact. . . . We think there is no evidence to show whether the husband or wife was the survivor. There may be surmise, and speculation, and guess, but we think there is no evidence." In this case it was proved that Mr. Underwood, the testator, was a robust, healthy man, and a good swimmer, and that his wife was in a weak state of health at the time of the catastrophe; and the medical witnesses, among whom was the eminent author of the Medical Jurisprudence, Dr. Taylor, concurred in the opinion that the comparative health and the sex of the two persons, as well as the fact that the testator was a good swimmer, rendered it almost certain that he would have survived his wife. But, on the other hand, two medical witnesses testified that no medical witness could form or give any opinion of any value in regard to which of the two persons, the testator or his wife, would survive. A man of seventy would be just as likely to survive a younger man, and a woman just as likely to survive a man, and a feeble or sickly man a strong or healthy man, as the contrary. Thus the scientific evidence, standing at contraries, as it always does, the court adopted the view of that class of the medical testimony which seemed most to conform to their own views of the probabilities in the case. The case was argued by very eminent counsel, and the court concurred in the advice of the common-law judges. The Lord Chancellor said: "I entirely concur in what was said by the learned judges on that subject, that there is no evidence whatever which would justify any one in coming" to the conclusion that the wife did not survive, "because in this case, as in all others where a person has to show that a particular state of things has arisen, *the evidence must be positive*; and it is not sufficient to show a variety of circumstances from which it may be very difficult to form an opinion one way or the other. I think it impossible to carry this evidence before us to any thing like proof, as to whether Mr. or Mrs. Underwood was the survivor. I give the medical gentlemen entire credit for speaking scientifically, and as they believe quite accurately (though I do not think that they themselves are very confident upon the subject), but to take what they say, calculating and reasoning *a priori*, for that is all it comes to, as to which of two people may have breathed a few seconds the longer at the bottom of the sea, as establishing the fact, seems to me to be quite misunderstanding the nature of human testimony. . . . I am utterly unconvinced that they can tell us which of these two persons died first, even supposing them to have been taken and quietly submerged to the bottom of the sea." Sir John Romilly said: "With the exception of *Sillick v. Booth*, 1 Y. & C., C. C. 117," in which the point does not appear to have been decided, "all the reported cases concur in this, — that in such a state of things it is impossible for the court to come to any conclusion as to which died first." *Mason v. Mason*, 1 Mer. 308; *Taylor v. Diplock*, 2 Phillim. 261; *Satterthwaite v. Powell*, 1 Curt. 705. Post, § 1, n. 1.

property to J. W. The testator and his wife were shipwrecked, and drowned at sea, one wave sweeping both of them into the sea, after which they were neither of them seen. The question arose between the next of kin and J. W., who claimed under the limitations of the will. It was held, that the burden of proof that the husband survived was upon J. W., inasmuch as his title depended upon the survivorship; and that for this purpose it was requisite to produce positive evidence to enable the court to pronounce in favor of the survivorship; and that, no such evidence having been adduced, the next of kin was entitled to the estate; and, finally, that the next of kin, as to personalty, and the heir at law, as to

* 160 * realty, stand in the same position, and the person claiming against either must make out his title. From all which, we must say, the rule seems now clearly established, not that in such cases the two or more persons, in regard to which a question of survivorship arises, will be presumed to have deceased at precisely the same time, which, as was said by Lord *Cranworth*, "is hardly within the range of imagination,"⁴ but that, it failing to be shown, by any satisfactory evidence, which died the first, the decision must be against the party upon whom rests the burden of proof.

4. We have had occasion to state the rule upon this general question, and to adduce the general range of the authorities in another place,⁵ from which it will appear that, unless the testator provides that a legacy shall go to the heir, or next of kin, or personal representative, in some such form as to clearly indicate that those terms are used to designate the persons described by them, in order to have them take directly under the will, as purchasers, the legacy will lapse; the general presumption being that these terms of succession are used to mark the extent of the interest thus intended to be conveyed to the legatee or devisee, and are therefore words of limitation merely.

⁴ *Underwood v. Wing*, 4 DeG., M. & G. 633, 661. Many other cases may be consulted upon this point, to which we have not deemed it important to refer, regarding the decision of the English courts upon the very point as far more satisfactory than any analysis which we could give. *Selwyn in re*, 3 Hagg. 748; *Wright v. Sarmuda*, in note, 2 Phillim. 266; *Wright v. Netherwood*, 2 Salk. in n. 593; *The King v. Dr. Hay*, 1 Wm. Bl. 640; *Broughton v. Randall*, Cro. Eliz. 502; *Colvin v. Procurator-General*, 1 Hagg. 92; *Hitchcock v. Beardsley*, West's Cas. t. Hard. 445.

⁵ Ante, § 4.

5. The same rule has generally been extended to cases where the testator has given a legacy by way of remitting a debt due from the legatee to the testator.⁶ But there are many cases where the intention to remit a debt is so fully and clearly expressed as to operate to cancel it, even where the testator survives the debtor.⁷ And a provision for creditors, in proportion to their debts, is of a *mixed character, partly of bounty and partly of * 161 obligation; and the will must be read as, to some extent, directing the payment of debts.⁸ And where the debts are barred by the statute of limitations, a specific provision for the payment would seem to have the effect to revive them, and make them payable by the executor, notwithstanding the creditor might de cease before the testator.⁹ And where a woman in her will forgives a debt to her son-in-law, and desires her executor to deliver up the bond to be cancelled, it is not lapsed by his dying before the testatrix.¹⁰ The distinction upon which Mr. Roper¹¹ insists is,

⁶ *Maitland v. Adair*, 3 Vesey, 231; *Elliot v. Davenport*, 1 P. Wms. 83; *Toplis v. Baker*, 2 Cox, 118; *Sibthorp v. Moxom*, 3 Atk. 580; *Izon v. Butler*, 2 Price, 34; *Attorney-General v. Holbrook*, 3 Y. & J. 114; s. c. 12 Price, 407; *South v. Williams*, 12 Sim. 566.

⁷ *South v. Williams*, 12 Sim. 566.

⁸ *Philips v. Philips*, 3 Hare, 281.

⁹ *Williamson v. Naylor*, 3 Y. & C., Exch. 208. An executor is not precluded from setting up debts due the estate against legatees in payment or part payment of their legacies, although such debts are barred by the statute of limitations. *Courtenay v. Williams*, 3 Hare, 539; *Rose v. Gould*, 15 Beav. 189; *Ford v. Beech*, 11 Q. B. 842; *Gibbons v. Vouillon*, 8 C. B. 483. But where there is a conditional covenant not to sue, as in the last case cited, or an absolute covenant not to sue, as in *Golds v. Greenfield*, 2 Sm. & Gif. 476, the executor cannot deduct the amount of the debt from a legacy. But in some cases, where the testator, who had obtained his discharge in bankruptcy, directed his executors to pay to the official assignee a sufficient sum to meet all the unpaid balance due to his creditors, it was held that such gift was not liable to lapse, the intention going beyond the mere discharge of any subsisting legal obligation, and extending to the discharge of the moral duty, for the ease of the testator's conscience more than for any benefit to the individual creditors. *In re Sowerby's Trusts*, 2 K. & J. 630; *Turner v. Martin*, 7 DeG., M. & G. 429.

¹⁰ *Sibthorp v. Moxton*, 1 Ves. Sen. 49; s. c. nom. *Sibthorp v. Moxom*, Atk. 580. Lord *Hardwicke* seems to have decided this case upon the general presumption, that, the testatrix having directed her executor to deliver up the bond to be cancelled, she must have intended a forgiveness or remission of the debt, and that equity would enforce it.

¹¹ *Roper on Legacies*, 476, 477.

between the giving of the debt as merely a personal benefit to the debtor, and a declaration of present intention to treat it as released or remitted to the debtor, — or between giving the debt as a legacy, and a remission of the debt, — that in the former case the debt will survive, if the debtor die before the testator; while, in the latter, a court of equity will enforce the remission of the debt,

as a release in equity. The case of *Elliot v. Davenport*¹² is * 162 cited as an illustration of the * first case, where the debt was not released, but intended to be kept on foot, and part of it to be paid to the testator's wife and children, and the rest is given to the debtor, upon the express condition that he first paid those several sums. The second point put by Mr. Roper is illustrated by the case of *Sibthorp v. Moxom*,¹⁰ already sufficiently stated.

6. The only comment which it seems needful to make in regard to this rule is, that Mr. Roper undoubtedly states the basis of the distinction truly, but without affording much aid towards solving the practical difficulties which will always be liable to arise in such cases. The distinction which this writer seems to regard as of vital importance, in determining the effect of the bequest to a debtor, intended to cancel the obligation between *giving* and *forgiving* the debt, does not seem to us of much importance any way.¹³ The real distinction rests upon the expressed intention of the testator to have the release of the debt carried into effect, for the benefit of whomsoever might be interested in the estate of the debtor, without regard to the fact whether the debtor should happen to survive him or not. If such an intent is fairly to be gathered from the words of the will, as construed by the help of all admissible aids, then the provision will be binding, notwith-

¹² 1 P. Wms. 83; s. c. 2 Vern. 521. This case places the distinction upon the ground, that "if a person says in his will, *I forgive such a debt, or my executor shall not demand it, or shall release it,*" this is a discharge of the debt, though the debtor dies in the lifetime of the testator. But if the debt is devised to the debtor, without words of release or discharge of the debt, and the debtor dies before the testator, the "legacy is lapsed," and the debt subsists.

¹³ 1 Jarman (ed. 1861), 315. "In *Maitland v. Adair*, 3 Vesey, 231, the words were, 'I return A. his bond.' A. died in the testator's lifetime, and it was held that the legacy lapsed. This case is overlooked by Mr. Roper (1 Treatise on Leg. 411), who lays more stress on the mere verbal distinction between the giving and forgiving the debt than seems warranted by the principles of the cases."

standing the decease of the debtor before the testator. And this is the true principle upon which lapse in all cases is prevented.¹⁴

7. The general rule in regard to the legitimate mode of preventing the lapse of a legacy seems now to be quite satisfactorily settled. It is requisite, not only that the testator should declare his intention that the legacy shall not lapse, but that he shall point out how the same is to be kept on foot, in the event of the decease of the legatee before the testator, and to whom it shall be paid. For Lord *Hardwicke* said,¹⁵ "If one devise real or personal * estate, and manifest an intention that the devise * 163 shall not lapse, this is not sufficient to exclude the heir or next of kin, unless he had nominated another legatee." But where such an intention is expressed, and the bequest is to A., and her executors or administrators, in the case of personal estate, or heirs, by parity of reason, in case of real estate, it will be held sufficient to prevent the lapse.¹⁶

8. In one case¹⁷ where a bequest was made to a married woman, to her separate use, during the joint lives of herself and husband, and, in case she survived him, to her absolutely; but if she did not survive her husband, to such person as she should appoint, and, in default of appointment, to her next of kin; and she died during the life of her husband without making any appointment; it was held by the Vice-Chancellor, and the decree affirmed by the Chancellor, that the legacy lapsed. But in the case of *Edwards v.*

¹⁴ 2 Wms. Ex'rs, 1087.

¹⁵ *Sibley v. Cook*, 3 Atk. 572.

¹⁶ *Toplis v. Baker*, 2 Cox, 118, 121. The Lord Chancellor, *Bacon*, said here, "Put the case of a testator saying, 'I give to A., and if A. shall die before me, yet I do not mean the legacy shall lapse,' I should not know how to prevent this legacy lapsing. But if the testator had said, 'If A. shall die, I mean his executors shall take it,' then I understand the effect very clearly, the executors being specially mentioned and substituted for the legatee." See also *Bridge v. Abbot*, 3 Br. C. C. 224; *Cotton v. Cotton*, 2 Beav. 67; *Long v. Blackall*, 3 Vesey, 486; *Jennings v. Gallimore*, id. 146; *Baines v. Ottey*, 1 My. & K. 465.

¹⁷ *Baker v. Hanbury*, 3 Russ. 340. This case was argued by very distinguished counsel, Mr. *Shadwell* and Mr. *Sugden*, upon different sides, who cited *Perkins v. Micklethwaite*, 1 P. Wms. 274, against the lapse, and *Calthorpe v. Gough*, 3 Br. C. C. 395 n., *Humberstone v. Stanton*, 1 V. & B. 385, in favor of it; and the Lord Chancellor *Lyndhurst* seems to have entertained no great question in regard to it being a case of lapse.

Saloway,¹⁸ Lord *Cottenham* held, in a precisely similar case, * 164 that * the gift did not lapse, but went to the next of kin under the will, as purchasers. It must be borne in mind that the more recent cases bear very decidedly against allowing the lapse of a legacy, where there is fair ground for determining in what direction the estate is appointed to go, by the terms of the will, in the event of the decease of the legatee.¹⁹

9. It seems, both in principle and according to the decided cases, that no parol evidence can be received to show that the testator did not intend the legacy to lapse. Accordingly, where the testator gave a legacy to one already dead, naming also his executors, administrators, or assigns, it was held not competent to show, by parol evidence, that the testator, at the time of making his will, was aware of the decease of this legatee, and intended the legacy to go to the personal representatives named.²⁰

¹⁸ 2 Phillips, 625. His Lordship here said: "The only safe way of determining what a testator intended is to look at what he has said." Whatever be said or thought of the motive for the gift to the next of kin, "the gift itself is there. . . . The gift to her next of kin, in default of appointment, stands, therefore, as a distinct substantive disposition in the will, and I can find no principle for taking that gift away upon a speculation of what the testator might have done under different circumstances." See also *Hardwick v. Thurston*, 4 Russ. 380; *Chatteris v. Young*, 2 Russ. 183.

When the case of *Edwards v. Saloway* was before the Vice-Chancellor (2 DeG. & Sm. 248), the learned judge said, in regard to the case of *Baker v. Hanbury*: "From the terms of the will in *Baker v. Hanbury*, Lord *Lyndhurst* inferred an intention that the bequest should be absolute [in the first donee], and the [subsequent] words used were only to protect the absolute bequest." The case is therefore virtually overruled, as any authority, upon a case where an intention can fairly be inferred, that the testator intended the estate to pass to other persons in the contemplated possible event of the decease of the first donee during the life of the testator. And the same rule of presumption is adopted in construing a similar provision in *Gosling v. Townshend*, 17 Beav. 245.

¹⁹ *Bridge v. Abbot*, 3 Br. C. C. 224. The Master of the Rolls here said, that, in order to prevent the lapse of a legacy, "it is necessary, according to *Sibley v. Cook*, 3 Atk. 572, not only that he should declare that the legacy should not lapse, but likewise who should take in the stead of the residuary legatee." This seems to have been the rule of the early cases. The later ones, although not entirely uniform, incline to save a lapse, where it is reasonably certain that the testator had in mind such a contingency, and named a person or class who might represent the legatee. But see *Browne v. Hope*, L. R. 14 Eq. 343.

²⁰ *Maybank v. Brooks*, 1 Br. C. C. 84. See also, to same effect, *Comfort v. Mather*, 2 W. & S. 450.

10. Lord *Alvanley*, Master of the Rolls, a judge of great learning and experience, has thus defined the doctrine in regard to lapse:²¹ "A testator is never to be supposed to mean to give to any but those who shall survive him, unless the intention is perfectly clear. I will not determine now, because it is not necessary, that where a legacy is given to a person, or to his representatives, it can mean any thing but in case of his death in the life of the testator; but it is perfectly clear, that where the fund is given to one for life, and after the death of that person to several others, and in case of their deaths to their representatives, there is no reason to presume an intention that it shall not lapse by the death of the legatee in the life of the testator. It is impossible, without transgressing every rule as to vesting, to * hold this legacy vested, the legatee not having lived to * 165 take the benefit under the testator's will." But the learned judge held in this case, that where there was an intervening life-estate after the death of the testator, before the legacy took effect, it was more reasonable to anticipate an intention in the testator to provide against a lapse. And where the testator bequeathed the residue to A. for life, and after her death legacies were given to B., or to her proper representatives if she should not be living at the death of A., and four other persons, or their representatives, and one of the four died in the lifetime of the testator, and another survived him, but died in the lifetime of A., it was held that the former lapsed, but that the latter took effect.²²

11. The same rule of construction has been applied where the legacy is appointed to be paid at a fixed period after the death of the testator. There, any provision that the legacy shall be paid to the legatee, or to his heirs, executors, &c., is supposed to have reference to the contingency of the decease of the legatee, during

²¹ *Corbyn v. French*, 4 Vesey, 418, 435.

²² The words of the will here were broad enough to have prevented the lapse in both cases; the words of the will, by implication, providing that the legacy should go to the personal representatives of the four persons, provided any one or more of them should not be living at the termination of the life-estate. This in strictness of language provided for a decease of the first donee, either in the life of the testator, or after his death, and during the intervening life-estate. But it was confined to the latter contingency, from the far greater probability of that being the intention of the testator. See also *Bone v. Cook*, M'Clel. Exch. 168; s. c. 13 Price, 332; *Hutcheson v. Hammond*, 3 Br. C. C. 129, 143; *Taylor v. Beverley*, 1 Coll. C. C. 108.

the period intervening between the death of the testator and the time of payment.²³

12. In *Gittings v. M'Dermott*,²⁴ this question is extensively * 166 discussed, and the authorities thoroughly reviewed, by Lord *Brougham*, and the conclusion reached, that where the testator gives to the children of his deceased sister E. W.,

²³ *Tidwell v. Ariel*, 3 Madd. 403, 409; *Waite v. Templer*, 2 Sim. 524. The testator here gave a legacy to T. P., "or to his heirs, executors, administrators, or assigns," and the bequest over was held void for uncertainty. And the same rule seems to have prevailed in the recent case of *Smith v. Oliver*, 11 Beav. 494.

²⁴ 2 My. & K. 69. His lordship cited also, in addition to the cases already adverted to, the following: *Holloway v. Holloway*, 5 Vesey, 399; *Lowndes v. Stone*, 4 Vesey, 649; *Vaux v. Henderson*, 1 J. & W. in n. 388. See also *Booth v. Vicars*, 1 Coll. C. C. 6. And where the residue is given to the testator's cousins-german, and in case of the death of any before the period of distribution the share of such one to go to his heirs, if any, and two of the number deceased, one leaving heirs and one not, the share of the former was held to go to the heirs, and the other to the remaining members of the class. *Coort v. Winder*, 8 Jur. 770. See also *Castle v. Eate*, 7 Beav. 296, *Smith v. Pybus*, 9 Vesey, 566, as to the latter point. And upon the point that the heir will take the share of the legatee when so named, see *Rheeder v. Ower*, 3 Br. C. C. 241; *Rickett v. Guillemard*, 12 Sim. 88; *Smith v. Palmer*, 7 Hare, 225. But the share of a share, in this last case, it was held, will lapse on the decease of the second taker. But in *Worlidge v. Churchill*, 3 Br. C. C. 465, it was held the survivor in such case shall take the whole both of original and accrued shares. See also *Harris v. Davis*, 1 Coll. C. C. 416. The heir of a devisee, deceased before the making of the will, cannot take, but the estate goes to the testator's heir. *Gore v. Stevens*, 1 Dana, 201. But on a devise to one and his heirs, where the devisee died before the testator, the heirs were held entitled to take. *Davis v. Taul*, 6 id. 51. And in the more recent case of *Potter's Trust*, L. R. 8 Eq. 52, it was held that in a devise to the children of L., and, in case of the death of any of his said nephews or nieces leaving issue, the issue to take the share of the parents, the children of nephews and nieces who deceased before the date of the will would take, as well as those who died after and before the testator. Vice-Chancellor *Malins* here reviews the decisions very extensively, and, although he finds many cases bearing in the opposite direction, comes to the very just conclusion, that they rest upon no sensible or sound basis. The opinion is creditable, as well for its independence as its ability. But in a still later case, *Hotchkiss's Trusts*, L. R. 8 Eq. 643, Vice-Chancellor *James* seems to incline to the former rule, and attempts to make a distinction between a bequest to a class and to the members of the class, which is too refined to meet the common-sense instincts of justice. The same learned judge takes a similar view in *Habergham v. Ridehalgh*, L. R. 9 Eq. 395.

enumerating their names, "or to their heirs," and three of the children died in the lifetime of the testator, the legacies to these children did not lapse, but that their next of kin took by substitution, at the death of the testator. And it was also held, that where the same testator gave to each of his sisters equal shares in the residue of his estate, naming them, and upon their deaths, respectively, to their heirs, and the sisters died before the testator, that their next of kin, respectively, were entitled to the share of the several sisters at the death of the testator, by way of substitution. And some writers and judges have been inclined to make a wide distinction between the word *or* and the word *and*, when followed by that class of equivocal words which may be used, either as words of limitation or as words of purchase; viz., "heirs, executors," &c.²⁵

13. It seems to be admitted on all hands, that where a legacy is given by way of trust, the death of the trustee will not create a lapse, but the cestui que trust will be entitled to the benefit of the bequest.²⁶ And even where the testator bequeathed to his daughter A., the wife of B., a legacy of £10,000, payable six months after his decease, and he recommended his daughter and her husband to settle it, together with such sum of money of the husband as he should choose, for the benefit of the daughter and her children, it was held to have created a trust in the £10,000 for the benefit of the children, and that consequently the legacy *did not lapse by the death of their mother in the * 167 lifetime of the testator.²⁷

14. The same rule, as to liability to lapse by the legatee dying before the testator, will apply, whether the legacy be one flowing exclusively from the bounty of the testator, or come primarily from another, but remain subject to the testamentary appointment

²⁵ 2 Wms. Ex'rs, 1088; 1 Roper on Leg. 473.

²⁶ 1 Roper, 474; *Eales v. England*, Prec. in Ch. 200; *Moggridge v. Thackwell*, 1 Ves. Jr. 464, 475.

²⁷ *Ford v. Fowler*, 3 Beav. 146. This case was decided by an eminent judge, Lord Langdale, M. R., and unquestionably in conformity with the general intent of the testator; but it seems to have gone further than most of the preceding cases, in treating a mere recommendation as binding upon the estate, which we have considered under another head. Ante, pt. 1, § 43. But, if the trust fails, the legacy lapses to the next of kin. *Abercrombie v. Abercrombie*, 27 Ala. 489.

of the testator.²⁸ The reason of this is very obvious. Such testamentary appointments are ambulatory during the life of the testator, and do not, therefore, become effectual until his death. Until that time they are subject to revocation and modification.

15. In the case of a bequest, depending upon contingency, and naming others to take when the contingency occurs, but the death of the first donee not being embraced in the contingency, the gift over will not take effect, unless the particular contingency occur. And the death of the first donee in the life of the testator, without that having occurred, will create a lapse, notwithstanding the donee over survive the testator.²⁹ It seems to be now settled, that, where the contingency upon which the estate over is given never takes place, the estate will fail. As where the testator bequeaths to his granddaughter J. C. L. a sum of money to be paid to her when she arrives at twenty-one, or is married, and directs that, if she shall die under twenty-one *and* unmarried, the legacy shall be paid to his other grand-daughters; and J. C. L. died in the
* 168 lifetime * of the testator, unmarried, but *after* attaining twenty-one; it was held that the other grand-daughters took nothing under the bequest; and it will make no difference as to the estate over failing, that the contingency is expressed in the alternative of J. C. L. dying before twenty-one *or* unmarried.³⁰

16. It seems to follow, from the principles already stated, that

²⁸ 2 Wms. Ex'rs, 1091, 1092, 1093; 1 Roper on Leg. 426; Oke v. Heath, 1 Ves. Sen. 135; Duke of Marlborough v. Godolphin, 2 Ves. Sen. 61, 73 et seq., where Lord *Hardwicke* gives a very extended reading upon the nature of testamentary powers. *Burges v. Mawbey*, 10 Vesey, 319.

²⁹ *Humberstone v. Stanton*, 1 V. & B. 385; *Doo v. Brabant*, 3 Br. C. C. 393; s. c. 4 T. R. 706; *Williams v. Jones*, 1 Russ. 517. But a postponement of the payment of a legacy, for the convenience of the estate, or in the discretion of the executor or trustee, will not subject the legacy to lapse by the death of the legatee between the death of the testator and the specified time of payment. *Traver v. Schell*, 20 N. Y. 89, 91. And the rule is the same where the legacy is charged upon real estate, and the postponement is based upon the condition of the estate, and the concurrence of him who is to pay, and not with reference to the legatee. *Harris v. Fly*, 7 Paige, 421.

³⁰ *Carpenter v. Heard*, 14 Pick. 449. The question is here very carefully examined by *Putnam, J.*, and the cases thoroughly reviewed, and the views of the learned judge seem to us worthy of adoption for their perspicuity and unquestionable reasonableness and justice. See also *Fulham v. Wickett*, Willes, 303, and Mr. Durnford's note, intimating an opinion in the contrary direction.

if one bequeath an estate, to be disposed of according to the uses and trusts declared in the will of another, a legacy will lapse, notwithstanding the legatee survive the testator in the latter will, unless he also survived the testator in the former will.⁸¹

17. Where a bequest is made to two or more persons, as joint tenants (and where the bequest is general, in such case they will take as such, unless prevented by statutory provision), and any one of the number survives the testator, there will be no lapse, although some of the joint devisees may de cease before the testator, the share of deceased joint tenants going to the survivors. And the same consequence follows, where the bequest to any of the joint tenants fails for any other cause.⁸² But where the bequest is to several persons, as tenants in common, there is no right of survivorship, and the share of any who die before the testator will lapse.⁸³

* 18. Husband and wife take by entreties, as it is * 169 called, the consequence of which is that neither can, by his or her own act alone, affect the estate.⁸⁴ But the survivor will take the whole estate, without regard to any conveyance by the other,

⁸¹ *Culsha v. Cheese*, 7 Hare, 236, 245; 1 Jarman, 316. Indeed, it does not seem important, where a will was made disposing of property according to the uses in another will, that the legatees should survive the testator in the latter will, in order to save a lapse, where the second will is so referred to as to become a part of the former, the same as any other writing, and not as a testamentary act. The legacies, therefore, under the first will, may be regarded as vesting upon the death of the first testator, unless the will is dependent upon the final testamentary act of the other testator; and if so, the estate cannot be said to vest until the de cease of the second testator. Such a disposition of property is virtually leaving it subject to the testamentary appointment of the second testator; and very likely that is the most usual form of making one will subject to the provisions of another. *s. p. Hamlet v. Johnson*, 26 Ala. 557.

⁸² *Buffar v. Bradford*, 2 Atk. 220; *Davis v. Kemp*, 1 Eq. Cas. Ab. 216, pl. 7; *Morley v. Bird*, 3 Vesey, 628. And where the bequest to one is revoked, the other takes the whole. *Humphrey v. Tayleur*, Amb. 136; *Larkins v. Larkins*, 3 B. & P. 16. The rule is the same as to real and personal estate in this respect. 1 Jarman, 316; *Hoppock v. Tucker*, 3 Th. Cook. 654. Bequest of real estate to two and their heirs and assigns creates a tenancy in common in Massachusetts. *Jones v. Crane*, 16 Gray, 308.

⁸³ *Page v. Page*, 2 P. Wms. 489; *Man v. Man*, 2 Str. 905. So also where the share of one of the joint legatees is revoked, that share will go to the other joint legatees. *Shaw v. M'Mahon*, 2 Con. & Law. 528.

⁸⁴ *Back v. Andrew*, 2 Vern. 120.

which becomes wholly inoperative by the survivorship of the other.³⁵ And where a bequest is made to husband and wife, together with other persons, the former are regarded as so entirely one person in law, that they have been held in such case to take but one share between them, the same as any one of the others,³⁶ notwithstanding the construction, probably, defeats the intention of the testator in the majority of instances, as in some of the cases where this rule has been applied, it appeared that in other portions of the will the testator had given equal sums to the husband and wife each, and to the others named with them in the joint bequest.³⁷ Some of the early cases have attempted to maintain, that where the gift was to husband and wife, as tenants in common, they each took an equal share with the other persons named.³⁸ But this particular distinction seems not entirely without question;³⁹ but many of the cases have evidently manifested a disposition to seize hold of slight circumstances for the sake of carrying into effect the presumed intention of giving the husband and wife each separate and equal shares with the others named in the same bequest.⁴⁰

19. And where a bequest is made to a class, as the children of A., whether he be living or dead, the same will not lapse, so long as any one entitled to come in under the bequest survives.⁴¹

* 170 * Such a bequest, as we have before stated,⁴² will include all the children, or others, answering the description of the name of the class which are in existence at the time the devise

³⁵ Doe d. Freestone v. Parratt, 5 T. R. 652.

³⁶ Back v. Andrew, 2 Vern. 120; Lewin v. Cox. Moore, 558, pl. 759; Anon., Skinner, 182; Co. Litt. 187 a; Bricker v. Whatley, 1 Vern. 233.

³⁷ In re Wylde, 2 DeG., M. & G. 724.

³⁸ Lewin v. Cox, Moore, 558; 2 Jarman, 232.

³⁹ Warrington v. Warrington, 2 Hare, 54.

⁴⁰ Warrington v. Warrington, 2 Hare, 54; Paine v. Wagner, 12 Sim. 184. Here the words, "equally divided share and share alike," were regarded as indicating a purpose that each person named should take an equal share. In Warrington v. Warrington, the relationship of the parties to the testator, both husband and wife being equally of kin, was relied upon as ground of presumption of an intention to give each a share. But see Gordon v. Whieldon, 11 Beav. 170.

⁴¹ Shuttleworth v. Greaves, 4 My. & Cr. 35.

⁴² Ante, § 2, pl. 2, and cases cited in notes. See also Viner v. Francis, 2 Br. C. C. 658. The case of Martin v. Wilson, 3 Br. C. C. 324, has not been followed. Shuttleworth v. Greaves, 4 My. & Cr. 35.

takes effect, unless there is something upon the face of the will indicating a different intention.

20. And a bequest to more than one person as executors has been held to be a devise to a class, so that, if one of them die in the lifetime of the testator, the whole vests in the survivors.⁴³ But where several persons are named as legatees of the residue, primarily, and are appointed to take equal shares, so as to create a tenancy in common, the fact that the same persons are also created executors will not constitute such a relation, that the share of one predeceasing the testator will pass to the survivors, but it will go to the next of kin as property undisposed of.⁴⁴

21. Some of the earlier cases⁴⁵ seem to have intimated an opinion, that where the class to which a bequest is made are to be ascertained upon the happening of some event which occurs in the lifetime of the testator, and one of the class deceases after the class is ascertained, and in the lifetime of the testator, the share of such person will lapse. But it seems finally to have been considered, that the event upon which the class is to be determined having happened before the death of the testator will make no difference in regard to the survivors of the class at the death of the testator taking the whole bequest, since it makes no difference in regard to the application of the principle when the class is ascertained. That may be done in the first instance by the very terms of the bequest, as where it is made to the present living children of A. B.; and that will not defeat the effect of the survivorship * in the class.⁴⁶ But it is undoubtedly true, * 171 that if, in such a case, the class were required to take separate shares in the bequest, as tenants in common, the share of

⁴³ *Knight v. Gould*, 2 My. & K. 295.

⁴⁴ *Barber v. Barber*, 3 My. & Cr. 688. Lord *Cottenham* here examines the cases at length, from which it would seem that executors to whom property is devised beneficially will not take by survivorship the share of any one of their number who may de cease before the testator, unless the bequest is in such a form as to create a joint tenancy, which is never the case where it appears that each is to have a separate share in the estate. *Owen v. Owen*, 1 Atk. 494; *Hunt v. Berkeley*, *ibid.* in note. See also *Bain v. Lescher*, 11 Sim. 397, from which it seems that a devise to children, as tenants in common, is not a gift to a class.

⁴⁵ *Allen v. Callow*, 3 Vesey, 289; *Ackerman v. Burrows*, 3 V. & B. 54.

⁴⁶ *Lee v. Pain*, 4 Hare, 201, 250. See also *Doe d. Stewart v. Sheffield*, 13 East, 526. This subject is discussed in 9 Jur. N. S. (part 2) 301.

such as deceased after the members of the class were ascertained would, upon principle, be regarded as having lapsed; but that is not what is commonly understood by a bequest to a class.⁴⁷

22. But where the bequest is only of the legal estate, for the benefit of some third person, it seems to be settled that the legal estate vests in the trustee.⁴⁸ The question is here examined very much in detail by Lord *Denman*, and the rule thus stated: "There is no doubt whatever, at the present day, but that a devise like the present, to a trustee, to receive the rents and profits and pay them over to a married woman for her separate use, and afterwards to convey them as she shall direct, vests the legal estate in the trustee."⁴⁹ In regard to the extent of the estate thus conveyed, it is here decided that, "for a great number of years past, the courts have held that trustees take that quantity of interest which the purposes of the trust require."⁵⁰ But in the case before the court, the learned judge concludes, that as the deviser had used words of inheritance, and as it seemed requisite for carrying the trust into effect, in the contingency that the cestui que trust had made an appointment in fee, it would be impossible to say that the entire and absolute fee-simple was not conveyed.

23. Where the bequest depends upon an intervening estate under the will, and is thus made to take effect only at the termination of the prior estate, and the prior estate lapses by the death of the legatee or devisee during the life of the testator, this will not defeat the estate over,⁵¹ but it will take effect immediately.⁵¹

⁴⁷ *Ham's Trust*, 2 Sim. n. s. 106. See also *Vaux v. Henderson*, 1 J. & W. 388, n. See also *Mebane v. Womack*, 2 Jones, Eq. 293.

⁴⁸ *Doe d. Shelley v. Eldin*, 4 Ad. & Ellis, 582.

⁴⁹ *Doe d. Booth v. Field*, 2 B. & Ad. 564.

⁵⁰ *Doe d. Player v. Nicholls*, 1 B. & C. 336; *Doe d. White v. Simpson*, 5 East, 162; *Doe d. Pratt v. Timins*, 1 B. & Ald. 530; *Warter v. Hutchinson*, 1 B. & C. 721; *Glover v. Monckton*, 3 Bing. 13; *Doe d. Brune v. Martyn*, 8 B. & C. 497.

⁵¹ *Miller v. Warren*, 2 Vern. 207; *Willing v. Baine*, 3 P. Wms. 113; *Ledsome v. Hickman*, 2 Vern. 611; *Walker v. Main*, 1 J. & W. 1; *Mackinnon v. Peach*, 2 Keen, 555; *Humphreys v. Howes*, 1 Russ. & My. 639; *Armstrong v. Armstrong*, 14 B. Mon. 333. See also *West v. Williams*, 15 Ark. 682; *Adams v. Gillespie*, 2 Jones, Eq. 244; *Norris v. Beyea*, 13 N. Y. 273; *Taylor v. Wendel*, 4 Bradf. Sur. Rep. 324, 331. In such cases, both estates vest at the same time; and if both devisees survive the testator, the estate in remainder will not fail by the devisee in remainder dying before the tenant for

* 24. Where land is devised, subject to a charge for the * 172 benefit of others, and the devisee predeceases the testator, so that the devise lapses, and the estate goes to the heir at law, and he enters and sells it, the legacies charged upon the estate remain a continuing charge.⁵² But where the person to be benefited by the charge upon land dies before the testator, a question of some difficulty may arise, whether the charge is thus gone for the benefit of the devisee in remainder, or it is to be regarded as real estate set apart for the first devisee, the devise of which, having failed, is now to be treated as so much real estate undisposed of, and which will consequently go to the heir.⁵³ If the charge upon the land, in terms, depend upon a contingency, which fails, and the estate is thereby defeated, the charge sinks for the benefit of the devisee, or whoever may be entitled to the principal estate.⁵⁴ Lord *Eldon* thus states the rule of law applicable to the case: ⁵⁵ * “The devise is absolute as to A. unless B. attain * 173

life. *Terrill v. Public Adm.*, 4 Bradf. Sur. Rep. 245. See also *Conklin v. Moore*, 2 Bradf. Sur. Rep. 179. The general rule stated in the text is adhered to also in the following American cases: *Prescott v. Prescott*, 7 Met. 141; *Goddard v. May*, 109 Mass. 468. Where the estate over depends upon the life-estate of the widow, and she waives the provision for her, the estate over will only take effect upon her decease. *Mowatt v. Carow*, 7 Paige, 328; *Arcularius v. Geisenhainer*, 3 Bradf. Sur. Rep. 64; *Taylor v. Wendel*, 4 id. 324. But where the devise was to A. until B. shall arrive at the age of twenty-one years, and then to B., and B. dies before that age, A.'s estate nevertheless continues until the time B. would have become twenty-one. *Coley v. Ballance*, 1 Winst. Eq. 89. See also *Sims v. Conger*, 39 Miss. 231; *Hinkley v. House of Refuge*, 40 Md. 461.

⁵² *Wigg v. Wigg*, 1 Atk. 382; *Hills v. Wirley*, 2 Atk. 605; *Oke v. Heath*, 1 Ves. Sen. 135; 1 Jarman, 320.

⁵³ 1 Jarman (1861), 320.

⁵⁴ *Attorney-General v. Milner*, 3 Atk. 112; *Croft v. Slee*, 4 Vesey, 60; *Re Cooper's Trusts*, 4 DeG., M. & G. 757.

⁵⁵ *Tregonwell v. Sydenham*, 3 Dow, 194, 210. Thus, where a legacy, payable in futuro, is so bequeathed that it will fail by the decease of the legatee before the time of payment, and that will always be the case, as we shall see, where such legacies are made payable in futuro, out of regard to the circumstances of the legatee, and not merely for the ease of the estate; all such cases will clearly fall within the spirit of the rule laid down by Lord *Eldon*, and consequently, if the legatee die before the vesting age, whether in the lifetime of the testator or not, the charge sinks into the estate. 1 Jarman (1861), 321. And if the legacy depend upon a contingency, as the legatee's attaining the age of twenty-one, and this contingency occur in the lifetime of

the age of twenty-one; if he does then, he is to have the legacy. But his attaining twenty-one is a condition upon which alone he is to have it; and if he does not attain that age, then the will is to be read as if no such legacy had been given, and the heir at law does not come in, because the whole is absolutely given to the devisee. But a gift which fails must be clearly intended, upon the failure of the condition, to be for the benefit of the devisee."

25. Whether the failure of an intervening estate in the case of a devise is to go for the benefit of the heir, or of the devisee of the residue of the estate, is to be determined with reference to the intention of the testator; whether the intervening estate was regarded as an exception to the general devise of the residue, or as a charge upon the estate. And although this is a rule which it is apprehended will not afford much practical aid in solving questions of this kind which may arise, it seems to have received the sanction of eminent judges, and the most experienced writers upon the subject.⁶⁶

26. There are also a considerable number of cases where the intervening estate or incumbrance has been construed as a charge upon the estate, and its failure has been allowed to operate for the benefit of the devisee.⁶⁷ This subject is very carefully examined in the case *Re Cooper's Trusts*,⁶⁸ and the distinction between

the testator, and thereafter the legatee die before the testator, the result is the same as if the legacy had been originally without condition. 1 *Jarman*, 321; ante, § 6, pl. 5, 6, and n.

⁶⁶ *Sir John Leach*, M. R., in *Cooke v. The Stationers' Company*, 3 My. & K. 262; 1 *Jarman*, 322. The cases where the decision was in favor of the heir are *Arnold v. Chapman*, 1 Ves. Sen. 108; *Gravenor v. Hallum*, Amb. 643; s. c. 1 Br. C. C. 61, n.; *Bland v. Wilkins*, 1 Br. C. C. 61, n.; *Sir John Leach*, in *Henchman v. Attorney-General*, 2 Sim. & Stu. 498; 1 *Jarman* (ed. 1861), 324, where it is said that none of these cases are authorities for the proposition that a charge, the gift of which is void ab initio, falls to the benefit of the heir.

⁶⁷ *Jackson v. Hurlock*, Amb. 487; s. c. 2 Eden, 263; *Barrington v. Hereford*, cited in 1 Br. C. C. 61; *Baker v. Hall*, 12 Vesey, 497; *Ridgway v. Woodhouse*, 7 Beav. 437. In *Kennell v. Abbott*, 4 Vesey, 802, 811, Lord *Alvanley*, M. R., said: "It is now perfectly settled, that if an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it, and take the estate." See *Harvey v. Lloyd*, 17 W. R. 990, for comments on *Jackson v. Hurlock*, supra.

⁶⁸ 4 DeG., M. & G. 757. See also *Tucker v. Kayess*, 4 K. & J. 339; *Sutcliffe v. Cole*, 3 Drew. 135. Where the share of one of two or more joint

* an exception and a charge fully maintained. The case * 174 may afford as much aid as any one yet reported, in defining the practical distinction between an exception from, and a charge upon, real estate devised.⁵⁹

27. By the statute now in force in England,⁶⁰ real estate comprised in a devise which fails for any cause goes into the residuary devise, and not to the heir, as formerly, by the decisions of the English courts. The same rule generally obtains in the United States.⁶¹

28. Legacies charged upon real estate lapse if the legatee die before the time of payment.⁶² But in *Birdsall v. Hewlett*,⁶³ Chancellor *Walworth* said he was not aware that the rule had ever been extended to a case where the estate was devised to a stranger, upon the express condition that he paid the legacy charged thereon.

residuary devisees lapses, it goes for the benefit of the heir. *Digby v. Legard*, 3 P. Wms. 22 and notes; *s. p. Bagwell v. Dry*, 1 P. Wms. 700; *Peat v. Chapman*, 1 Ves. Sen. 542. And where the proceeds of real estate are appointed or bequeathed to persons whose legacies lapse, the same will go to the heir. *Cruse v. Barley*, 3 P. Wms. 20; *Salt v. Chattaway*, 3 Beav. 576. So also where there is a residuary devise on condition that a portion of the corpus of the estate go to another, which latter devise lapses, if the same be regarded as an exception from the residuary devise, it will go to the heir; but if it be made a charge upon the estate, its lapse will leave the whole estate to go to the residuary devisee. *Cooke v. Stationers' Company*, 3 My. & K. 262. A void legacy will go for the benefit of the residuary legatee. *Hamberlin v. Terry*, 1 Sm. & M. Eq. 589.

⁵⁹ *Re Cooper's Trusts*, 4 DeG., M. & G. 757. Sir *J. L. Knight Bruce* said: "The law of the court is settled, agreeably to reason and good sense, that where landed property is given by will to one set of persons, or according to one set of limitations, but is subjected by the will to a pecuniary charge in favor of other interests, and those other interests, given by the will, do not exhaust the entire property in the money, the charge, so far as it is not given away, sinks, for the benefit of those to whom the real estate is devised, subject to the charge. That, I apprehend, no one will dispute."

⁶⁰ 1 Vict. ch. 26, § 25. Other portions of this statute, intended to prevent the lapse of legacies to children and issue, we have considered, ante, § 3, pl. 10, 11.

⁶¹ *Frazier v. Frazier*, 2 Leigh, 642, 649, 650.

⁶² *Lyman v. Vanderspiegel*, 1 Aikens (Vt.), 275, 280. But it will not lapse after the death of the testator, if the payment is deferred to accommodate the estate, and not out of regard to the condition or circumstances of the legatee. *Harris v. Fly*, 7 Paige, 421; *Donner's Appeal*, 2 W. & S. 372.

⁶³ 1 Paige, 32, 34.

29. In a very recent case,⁶⁴ it was held that a legacy
 * 175 given to * one by name, and in the event of his death to
 another, the alternative gift will take effect, if the first legatee die in the testator's lifetime; and the same result will follow where the first taker is one of a class to whom the bequest is made, as where the bequest was of the residue to the testator's grandchildren, the children of his two daughters, "to be paid to them, share and share alike, as they shall respectively arrive at the age of twenty-one years," and, in the event of the death of any one of them before arriving at that age, the share of such one to go "to the mother, if living." The son of one of the daughters dying before that age, unmarried, and without issue, it was held the mother was entitled to his share.

30. In some of the American cases, the points already stated have been very lucidly discussed. The question of survivorship among joint legatees is thus stated by Mr. Justice *Metcalf*:⁶⁵ "It is a rule of the common law, that a legacy lapses, or is extinguished, by the death of the legatee while the testator is alive. This rule does not apply to legacies given to two or more jointly (in joint tenancy), but does apply to legacies given to two or more as tenants in common. And it is repeatedly stated in the books, that, when an aggregate fund is bequeathed to several legatees, to be divided among them, nominatim in equal shares, if any of them die before the testator, what was intended for them will lapse. But where a legacy is given to a class of persons, in general terms, as tenants in common, the death of one or more of them before the testator will not cause a lapse of any part of the fund, but the survivors of the class will take the whole."

31. The cases are very numerous in the American courts where the question, what amounts to a lapse, is discussed. The ordinary case of lapse by the decease of the legatee before the death of the testator requires no discussion.⁶⁶ Where both the legatee for life

⁶⁴ *Martha May's Appeal*, 41 Penn. St. 512. There is an early statute in Pennsylvania, March 19, 1810, by which the lapse of legacies are affected in that state to some extent. *Schieffelin v. Kessler*, 5 Rawle, 115; *Fairly v. Kline*, 2 Penn. 754.

⁶⁵ *Jackson v. Roberts*, 14 Gray, 546, 550; s. r. *Stires v. Van Rensselaer*, 2 Bradf. Sur. Rep. 172.

⁶⁶ *Putnam, J.*, in *Hayden v. Stoughton*, 5 Pick. 528; *Ballard v. Ballard*, 18 Pick. 41; *Weishaupt v. Brehman*, 5 Binney, 115. And where the legacy is

and the one in remainder die before the testator, the whole estate falls into the residue.⁶⁷ So also where the legacy is given upon a condition precedent not performed.⁶⁷

* 32. It is not important to the vesting of a legacy in re- * 176 mainder, that the legatee in remainder should survive the tenant for life, since both interests vest at the decease of the testator, and the legatee in remainder predeceasing the tenant for life only passes that interest to the next of kin of him entitled in remainder; but such next of kin cannot come into possession until the termination of the life-interest.⁶⁸ But the provision in the will that the legacy shall be invested, and not transferable during the life of the legatee, was held not to prevent a lapse by the decease of the legatee before the testator, it being regarded, not as restricting the estate of the donee to a life-interest, but as a restraint upon the mode of enjoyment, and through the medium of a trustee to prevent the alienation during the life of the donee.⁶⁹

33. In speaking of contingent devises and bequests we shall have occasion to discuss the distinction between making the vesting of the estate, and making only the enjoyment of it dependent upon the happening of a future event, as the legatee arriving at a certain age. It may be proper to state here, that in the former case, when the legatee dies before the happening of the event, the legacy or devise will lapse, but not in the latter.⁷⁰

34. Where a legacy lapses, there being no residuary bequest, it will go to the next of kin, as estate undisposed of under the will.⁷¹

35. A legacy given to one in trust for another will not lapse by reason of the death of the trustee before the testator.⁷² But a

left to one and her heirs, and she dies before the testator, the legacy lapses. *Dickinson v. Purvis*, 8 S. & R. 71.

⁶⁷ *Prescott v. Prescott*, 7 Met. 141.

⁶⁸ *Terrill v. Public Administrator*, 4 Bradf. Sur. Rep. 245.

⁶⁹ *McLoskey v. Reid*, 4 Bradf. Sur. Rep. 334; ante, pt. 1, p. 734, n. 1.

⁷⁰ *Van Wyck v. Bloodgood*, 1 Bradf. Sur. Rep. 154; *Wheeler v. Lester*, 1 Bradf. Sur. Rep. 213. Any restriction upon the mode of enjoyment of the estate in remainder will not so far defeat the vesting as to cause a lapse by the decease of the legatee in remainder before the termination of the life-estate. *Conklin v. Moore*, 2 Bradf. Sur. Rep. 179; *Dominick v. Moore*, 2 Bradf. Sur. Rep. 201.

⁷¹ *Armstrong v. Moran*, 1 Bradf. Sur. Rep. 314.

⁷² *Moggridge v. Thackwell*, 1 Ves. Jr. 464, 475.

legacy to one on condition he attain twenty-one will lapse if he die before that age.⁷³

36. In Connecticut, legacies given to children, who die before the testator, must be treated as intestate estate.⁷⁴ And in * 177 * Massachusetts, a devise of the residue of the estate in trust for four sons, as tenants in common, the share of one dying before the testator is treated as undevise estate.⁷⁵ So also of the provision for a portion of a trust-fund being applied to purchase an annuity for the support of one who died before the event upon which it was to take effect.⁷⁶

37. A legacy, or bequest, sometimes fails by reason of the impossibility of ascertaining the amount, as where the testator directed his residuary personalty to be applied to the construction of a well and public pump, and the surplus, if any, to be applied for the benefit of a public school, the first bequest being held void, it was decided⁷⁷ that the whole gift must fail, by reason of the impossibility of ascertaining the amount of the last bequest; but it seems rather a lame view of the law, although maintained in other cases.

38. Where by the terms of the will certain legacies were compelled to suffer abatement, and afterwards one of these lapsed, it was held that it must go to those legatees who had suffered the abatement.⁷⁸

SECTION IX.

CUMULATIVE LEGACIES.

1. How defined. Distinction, whether two legacies are to be held repetitions of the same gift, or distinct and independent.
2. If of same amount, and in the same identical instrument, not cumulative.
3. If otherwise, presumed to be cumulative, unless evidence of other intent.

⁷³ *Atkinson v. Turner*, 2 Atk. 41; *Hustler v. Tillbrook*, 9 Sim. 368; *Smell v. Dee*, 2 Salk. 415.

⁷⁴ *Colt v. Colt*, 33 Conn. 270.

⁷⁵ *Lombard v. Boyden*, 5 Allen, 249.

⁷⁶ *Power v. Hayne*, 17 W. Rep. 783; s. c. L. R. 8 Eq. 262.

⁷⁷ *Kirkman v. Lewis*, 17 W. R. 907; see also *Aston v. Wood*, L. R. 6 Eq. 419.

⁷⁸ *Sands v. Lyne*, L. R. 8 Eq. 482.

4. Sir *James Wigram's* definition of distinction between repetition and cumulative gifts.
5. Grounds upon which accumulation may be presumed.
6. The result of all the cases is, that we must guess out the testator's meaning the best way we can.
7. The amount of evidence required to rebut primary presumption depends on circumstances.
8. Illustration of the point by the case of *Greenwood v. Greenwood*.
9. If the sums are unequal, the legatee takes both, unless there is proof of other intent.
10. The repetition of legacies in different instruments affords slight ground for accumulation.
11. If the amount of two gifts is the same, and the latter paper substitutionary, no accumulation.
12. Legacies not ejusdem generis, or not payable in same event, held cumulative.
- * 13. Where different, or additional motives alleged, gifts held cumulative. * 178
- 14, and n. 21. Evidence to place court in position of testator admissible, but not direct proof of intention or motive.
15. Case in Maryland illustrating several points in the law of devises and legacies.
16. Clearly expressed intent must be followed, and not that which may be conjectured or inferred.

§ 9. 1. CUMULATIVE LEGACIES, or repetition of legacies, as it is sometimes called, are, where the same, or a different amount of money, or other things, estimated by quantity,¹ is given to the same person more than once in the last will and testament of any one.

2. If the legacies are of the same amount, and given by the same identical instrument, as in the main body of the will, or in the same codicil, the presumption is that they are mere repetitions of the same gift, and they will not be construed as cumulative, unless there be something in the language, or in the attending circumstances, proper to come in aid of the construction, showing a different intent.²

3. Where the legacies are not of the same amount, or not given in the same instrument, one being given in the will and the other in the codicil, or both given in different codicils, the presumption is they were intended to be cumulative, and the legatee will be

¹ If a legacy be of some specific thing, and be repeated ever so many times in the will or codicils, it can only amount to one bequest, since the same identical thing can only be bequeathed once. Sir *James Wigram*, Vice-Chancellor, in *Suisse v. Lowther*, 2 Hare, 424, 432, 433; 2 Roper, 995.

² *Holford v. Wood*, 4 Vesey, 76; *Manning v. Thesiger*, 3 My. & K. 29; *Ridges v. Morrison*, 1 Br. C. C. 389.

entitled to both, unless there is some competent ground to infer a different intent on the part of the testator.³

* 179 * 4. This subject is discussed by Sir *James Wigram*, Vice-Chancellor, in *Suisse v. Lowther*,⁴ and the prevailing doctrine placed in a very clear light. "The mere fact that the amount is the same, is not such an identification of the second with the first as would prevent both from taking effect as cumulative; but if, in addition to the amounts being the same, the testator connects a motive with both, and the express motive is also the same, the double coincidence induces the court to believe that repetition, and not accumulation, was intended. Except in such cases, and the class of cases to which I am about to advert, the court does not infer that repetition was the object, unless it be

³ *Curry v. Pile*, 2 Br. C. C. 225; *Yockney v. Hansard*, 3 Hare, 620, 622. The cases upon this point are very numerous, and too diversified to be here analyzed. We must content ourselves by a simple reference to a very few. See *Coote v. Boyd*, 2 Br. C. C. 521; *Lobley v. Stocks*, 19 Beav. 392; *Russell v. Dickson*, 4 Ho. Lds. Cas. 293; *Roch v. Callen*, 6 Hare, 531; *Mores' Trust*, 10 Hare, 171; *Warwick v. Hawkins*, 5 DeG. & S. 481. See also *Cunningham v. Spickler*, 4 Gill, 280; *Sawrey v. Rumney*, 15 Eng. Law & Eq. 307; 17 Jur. 88; *Brine v. Ferrier*, 7 Sim. 549. It seems to be an almost universal rule, that where the legacies are given by different instruments, they are held cumulative. *Windham v. Windham*, Finch, 267; *Hooley v. Hatton*, 1 Br. C. C. 390, and note; *Radburn v. Jervis*, 3 Beav. 450; *Tweeddale v. Tweeddale*, 10 Sim. 453; *Forbes v. Lawrence*, 1 Coll. C. C. 495; *Ford v. Ruxton*, 1 id. 403; *Watson v. Reed*, 5 Sim. 431; *Gordon v. Hoffman*, 7 Sim. 29; *Mackenzie v. Mackenzie*, 2 Russ. 262; *Guy v. Sharp*, 1 My. & K. 589; *Attorney-General v. George*, 8 Sim. 138; *Spire v. Smith*, 1 Beav. 419. But in all these cases the court profess to look into the language of the instruments and the surrounding circumstances, and to decide upon the preponderance of probability in regard to the intention of the testator. Thus in the early case of *James v. Semmens*, 2 H. Bl. 213, it is declared, the rule above stated will prevail, unless there be some circumstances to show that the intent of the testator was that he should take but one. And this presumption may be strengthened or rebutted by any circumstances, which according to the common experience of mankind will enable the court to reach the real intent of the testator, although defeating one legacy. *Robley v. Robley*, 2 Beav. 95; *Walsh v. Gladstone*, 1 Phill. C. C. 294; *Gillespie v. Alexander*, 2 Sim. & Stu. 145; *Graves v. Hicks*, 6 Sim. 391.

⁴ 2 Hare, 424, 432. The general question how far different legacies to the same person are to be held repetitions, and when cumulative, has been extensively discussed in the American courts. The opinion of *Kent*, Ch. J., in *Dewitt v. Yates*, 10 Johns. 156, and of *Hornblower*, Ch. J., in *Jones v. Creveling*, 4 Harrison, 127, are regarded as leading opinions upon the question.

so declared, or it is to be collected from the words of the will itself."

5. "The presumption in the case of several gifts, by different instruments, being in favor of accumulation, it is clear that the claim of the plaintiff in this case must be strengthened by any circumstances of difference between the two gifts, whether it be found in the amount, in the character in which it is given, in the mode of enjoyment, in the extent of the interest, or in the motive for the bounty. All these considerations tend, in the judgment of the court, to support the argument in favor of accumulation."

6. And it is certain that the considerations above enumerated all tend, with more or less force and certainty, to show that legacies repeated in the last will were intended to be cumulative, and not mere repetitions. In short, it is obvious that each particular case will commonly afford some ground of conjecture, more or less satisfactory, whether the naming of the gift more than once is a mere repetition, or is for the purpose of enhancing the bounty. * It must therefore be admitted, in the language * 180 of an eminent judge,⁵ that notwithstanding all the nice distinctions which have been taken by the courts upon this subject, we must come, at last, to the plain common-sense question, What was the intention of the testator, as indicated by his language, viewed in the light of surrounding circumstances?

7. It must be apparent, from what has been already said, that much the most difficult part of this portion of the subject will be to find any satisfactory mode of determining the precise grounds upon which the courts are willing to depart from the primary presumptions already stated. The civil law required the clearest evidence of intention to give double legacies, where the repetition was in the same instrument.⁶ But the English law has not attempted to define the quantum of evidence which shall suffice to rebut the primary presumption in such cases. It must depend, in a considerable degree, upon facts and circumstances peculiar to each case. So that the rule declared in one case will be no guide, beyond that of mere general instruction, towards the decision of any other case.

8. One can scarcely read any case upon this point without per-

⁵ Chief Justice *Hornblower*, in *Jones v. Creveling*, 4 Harrison, 127.

⁶ Dig. 30, 1, 34; Dig. 22, 3, 12; *Dewitt v. Yates*, 10 Johns. 156, 159.

ceiving some ground for conjecture, either in favor of repetitions of legacies being intended for distinct gifts, or of their being mere repetitions of the same gift. Thus in *Greenwood v. Greenwood*,⁷ the legacy being to a married woman, where it is named the second time, it is added, "for her own use and disposing, notwithstanding her coverture," which evidently must have been the motive of naming the gift again. For it would scarcely be supposed the testator intended to give two gifts, one of which should be exempt from the control of the legatee's husband, and the other not.

9. Where the sums are different the legatee will take both, unless there is sufficient reason to understand that the larger sum, being mentioned last, was intended as a mere enlargement of the first gift, and not as an addition to it, as was claimed in *Curry v. Pile*,⁸ where the testator first gave £1,000, and then £5,000, at the age of twenty-one, to the same legatee. But the court decided in favor of both gifts.

* 181 * 10. Where the legacies are of the same sum, but given by different instruments, there will always arise considerable doubt in the mind whether they are not mere repetitions; and especially when the last instrument is complete, or nearly so, in itself, making a disposition of most of the testator's estate. Hence although the general presumption that the gifts were intended to be cumulative will prevail, in the absence of all grounds of contrary presumption,⁹ it is evident that slight evidences of a contrary purpose in the mind of the testator will incline the court to adopt such a conclusion. And some of the more recent cases seem to incline to the view that the mere repetition of the legacies before given in the will or codicil, in an additional codicil, ought not, in itself alone, to form any sufficient ground to allow both.¹⁰

11. It seems clear, both from principle and authority, that where the amount of the legacies is the same, and the instrument

⁷ 1 Br. C. C. 30, and note. See also *Garth v. Meyrick*, 1 Br. C. C. 30.

⁸ 2 Br. C. C. 225.

⁹ *Wallop v. Hewett*, 2 Ch. Rep. 70; *Newport v. Kynaston*, Finch, 294; *Baillie v. Butterfield*, 1 Cox, 392.

¹⁰ Sir *Wm. Grant*, M. R., in *Benyon v. Benyon*, 17 Vesey, 34, 41, 42, citing Lord *Thurlow*, in *Ridges v. Morrison*, 1 Br. C. C. 389. See also *Currie v. Pye*, 17 Vesey, 462, where Lord *Eldon*, Chancellor, seems to incline to the same view.

in which the repetition occurs is merely a copy of the former instrument in which the first gift occurs, with some few additions or changes, such as might be expected to have occurred in the purposes of the testator, and as constituting the obvious reason for making the additional codicil, indeed in all cases where the paper in which the repetition occurs is evidently a *substitutionary*, and not chiefly an additional testamentary, instrument, a very strong presumption arises in favor of the repetition not being intended as cumulative.¹¹

12. Where the legacies are not *ejusdem generis*, it tends to raise a presumption that they were intended to be cumulative.¹² Where one of the sums is given absolutely, and the other only upon contingency, they will be regarded as distinct gifts.¹³ So where the gifts become payable at different times.¹⁴

13. So where a different or additional motive is alleged for the * gift, it becomes an additional ground of treating * 182 the gifts as independent of each other.¹⁵

¹¹ *Jackson v. Jackson*, 2 Cox, 35, 43.

¹² *Masters v. Masters*, 1 P. Wms. 421, 423; *Ives v. Dodgson*, L. R. 9 Eq. 401.

¹³ *Hodges v. Peacock*, 3 Vesey, 735.

¹⁴ *Wray v. Field*, 2 Russ. 257; s. c. Madd. & Geld. 300.

¹⁵ *Ridges v. Morrison*, 1 Br. C. C. 389; *Currie v. Pye*, 17 Vesey, 462; *Hurst v. Beach*, 5 Madd. 351. The rule upon this point is very lucidly stated by Sir *John Leach*, V. C., in the case just cited. "I think the true result of the decisions, as they apply to the present point, is to be stated thus: Where a testator leaves two testamentary instruments, and in both has given a legacy simpliciter to the same person, the court, considering that he who has twice given must, *prima facie*, be intended to mean two gifts, awards to the legatee both legacies; and it is indifferent whether the second legacy is of the same amount, or less, or larger, than the first. But if in such two instruments the legacies are not given simpliciter, but the motive of the gift is expressed, and in both instruments the same motive is expressed, and the same sum is given, the court considers these two coincidences as raising a presumption that the testator did not by the second instrument mean a second gift, but meant only a repetition of the former gift. The court raises this presumption only where the double coincidence occurs, of the same motive, and the same sum, in both instruments. It will not raise it, if in either instrument there be no motive, or a different motive, expressed, although the sums be the same; nor will it raise it if the same motive be expressed in both instruments, and the sums be different. The presumption cannot therefore be raised in this case, although it be admitted that the motives are the same, inasmuch as the sums are different, and upon the face of these instruments the defendant is entitled to both

In regard to the ground upon which some of the leading cases have been considered as containing internal evidence that the gifts were mere repetitions, it may be proper to add a few words. The case of *London v. Russell*,¹⁶ where the will gave the testator's wife £1,000, and the codicil reciting that fact added, "I do now give £1,600, and whatsoever is in my former will, to my wife, and that my former will shall stand in full force, notwithstanding the codicil," and it was held, as the will contained specific legacies to the wife, the general legacy must be restricted to £1,600, seems to have been decided against the natural force of the language, and we should conjecture against the intention of the testator.

* 183 But, as * already stated, where it is evident, from comparison of the terms, or for any other reason, that the instrument containing the repetition is merely substitutionary, as where the great majority of the bequests compare minutely with those contained in the former instrument, either in kind, character, or amount, it will be easy to conclude that even those of different quantity, where the sums are changed, to some extent, were nevertheless intended to come in the place of those before given to the same person.¹⁷ Where there is an alteration in the disposition of the legacy at the time of its repetition, and this is explained as necessary, on the ground of the actual state of circumstances, it will in general incline the court to treat the gifts as mere repetitions.¹⁸ The fact that numerous legacies are repeated, of persons in very different circumstances, and in different relations to the testator, renders it highly improbable that they were all intended

sums. This reasoning has no application to cases where the second instrument affords intrinsic evidence that it was intended by the testator in substitution of the first instrument, as in the cases of *The Duke of St. Albans v. Beauclerk*, 2 Atk. 636, *Coote v. Boyd*, 2 Br. C. C. 521, and the late case of *Attorney-General v. Harley*, 4 Madd. 263, before me." To this we would add that the question is further discussed in *Lord v. Sutcliffe*, 2 Sim. 273; *Strong v. Ingram*, 6 Sim. 197; *Lee v. Pain*, 4 Hare, 201, 216; *Pym v. Lockyer*, 5 My. & Cr. 29; *Wilson v. O'Leary*, 7 Ch. App. 448. There seems to be no reason when the testator, for any cause, chooses to execute codicils in duplicate, that the legacies in each should be regarded as cumulative. *Whyte v. Whyte*, 22 W. R. 180; s. c. L. R. 17 Eq. 50.

¹⁶ *Finch*, 290.

¹⁷ *Duke of St. Albans v. Beauclerk*, 2 Atk. 636; *Campbell v. Earl of Radnor*, 1 Br. C. C. 271; *Moggridge v. Thackwell*, 1 Ves. Jr. 464, 472.

¹⁸ *Allen v. Callow*, 3 Vesey, 289.

as cumulative gifts; and, if not all so intended, the presumption will be strong that none were so intended.¹⁹ It sometimes happens, that all the general legacies are contained in a codicil, and repeated with slight modifications in a later codicil. In such cases the latter is held as substitutionary.²⁰

14. It has sometimes been made a question how far direct evidence of intention on the part of the testator is admissible to rebut or control the legal intendment or construction of the words of the will, in regard to cumulative legacies. But we apprehend the same rule applies in this respect as in regard to all other questions of the intention of the testator. It is competent, by extrinsic evidence, to show the condition and circumstances of the testator and of his family, and those in position to expect his bounty, or named in his will; but not to give direct evidence by means of declarations of the testator, or, by proof of his conduct, to show in what sense he intended the words of his will to be received.²¹

* 15. There is a case in Maryland²² illustrating more * 184 than one point in the law of devises and legacies, where the father of an idiot child, R., devised an inadequate allowance for its maintenance, and the mother, after the death of the father, devised all the residue of her estate to her eight daughters, to be equally divided between them; and that the portion of R. should be invested in bank-stocks in the name of R., and that U., a sister of R., should receive the dividends, and apply the same to the support of R. during her life, and that R. was to live with U.; and from the death of R. the stock was given to U. as a compensation for her trouble in providing for R. C., the husband of U., sup-

¹⁹ *Coote v. Boyd*, 2 Br. C. C. 521, 528.

²⁰ *Barclay v. Wainwright*, 3 Vesey, 462. This subject is further discussed in *Osborne v. Duke of Leeds*, 5 Vesey, 369; *Attorney-General v. Harley*, 4 Madd. 263; *Fraser v. Byng*, 1 Russ. & My. 90; *Kidd v. North*, 14 Sim. 463; s. c. 2 Phill. C. C. 91.

²¹ *Osborne v. Duke of Leeds*, 5 Vesey, 369, 380; *Hurst v. Beach*, 5 Madd. 351; *Martin v. Drinkwater*, 2 Beav. 215; ante, pt. 1, §§ 39, 41. The language of Lord *Langdale*, M. R., in *Martin v. Drinkwater*, 2 Beav. 215, is a careful definition of the rule admitting, and the extent to which it is proper to admit, extrinsic evidence upon this point. "I consider the rule as settled; you are at liberty to prove the circumstances of the testator, so far as to enable the court to place itself in the situation of the testator at the time of making his will, but you are not at liberty to prove either his motives or intentions."

²² *Hoffman, Adm'r v. Cromwell*, 6 G. & J. 144.

ported and maintained R. On the death of R., C. claimed an allowance for her maintenance, and was allowed \$500 per annum, and the interest thereon. It was held, 1st. That the allowance was not too large. 2d. That the provision of the mother was cumulative to that of the father, and no portion of it was intended for distribution among the representatives of R. 3d. That it was not a general bequest to R., applicable in the hands of her administrator to her debts generally, and therefore that C. could sue for the dividends directly, and that neither the dividends nor principal were payable to R.'s administrator, to be by him accounted for.

16. We have elsewhere referred to the effect of erroneous recitals in codicils of bequests given in the will or in former codicils.²³ As matter of course, where a former bequest is merely enlarged or diminished by subsequent testamentary provision, it will be construed as a qualification of the former gift upon the same terms expressed in the original gift, unless the language imports the contrary. But when the testatrix had given A. B. a contingent annuity of £40, and also a legacy of £30, and by codicil provided, "And I increase the immediate annuity of £30, left by my will to" A. B., "to an annuity of £50," it was held, that A. B. took an annuity of £50, in addition to the contingent annuity of £40.²⁴

SECTION X.

SATISFACTION OF DEBTS BY LEGACIES.

1. The former reference to the rule. Its unsatisfactory character.
 2. Statement of the rule, and the only ground upon which it could fairly rest.
 3. Further exposition of the true basis of the law upon this point.
 4. Exceptions. Legacy of less amount than debt; or not payable at same time; or not of same nature. Cases illustrating several points.
 5. So also if the legacy be given for a special purpose; or if the debt be contracted subsequent to the date of the will; or is contingent; or the debt is uncertain; or negotiable.
- * 185 * 6. So where will contains direction for payment of debts and legacies.
7. The presumption does not apply between master and servant, parent and child. Parol evidence not admissible to control the presumption.

²³ Ante, vol. 1, p. 291, and note; post, vol. 2, p. 202.

²⁴ *Ives v. Dodgson*, L. R. 9 Eq. 401.

8. Legacy to child presumably in satisfaction of debts by way of advancement.
9. Legacy by creditor to debtor no release of debt unless such was the intent.
- n. 27. Grounds for receiving parol evidence in such cases.
10. The general rule and exceptions need not be discussed in detail.
11. Creditor appointing debtor executor releases cause of action at law.
12. In equity, the debt is held to be assets in the executor's hands for all purposes.
13. The Massachusetts courts regard a legacy as a gratuity, unless a different purpose is shown.
14. And the same rule prevails in Kentucky.
15. Such seems the natural presumption in ordinary cases, and the inclination of the courts in this country.
16. Advancements not allowed towards legacies except upon some direction in the will. But real estate may be construed as satisfaction of a settlement.

§ 10. 1. We have before briefly alluded to this subject.¹ And we must confess that the argument of *Bronson, J.*,² where he illustrates the inconsistencies of the professed rule upon the subject, and shows the glaring absurdities to which it leads, appears to us to be fraught with great wisdom and justice.³ But the rule seems, nevertheless, still to maintain a kind of dying existence.

2. It is thus stated: Where a debtor bequeaths a legacy to his creditor of equal or greater amount than the debt, and of the same character, and payable after the debt becomes due, it is the practice of the courts of equity to regard it, *prima facie*, as intended to be in satisfaction of the debt.⁴ In the case of *Fowler v. Fowler*,⁴ Lord *Talbot*, Chancellor, where the question arose in regard to arrears of pin-money due the wife being satisfied by a legacy, said, "he thought that, the legacy given to her being greater than the debt, it ought to be construed a satisfaction of such debt, and that there * was no reason to except the wife out of the * 186

¹ Ante, pt. 1, § 39, pl. 3, n. 6, 7.

² *Eaton v. Benton*, 2 Hill, N. Y. 576.

³ Ante, pt. 1, § 39, n. 6.

⁴ *Brown v. Dawson*, Prec. in Ch. 240; *Fowler v. Fowler*, 3 P. Wms. 353. See also *Gaynon v. Wood*, 1 Dick. 331. There is also a class of cases where the legacy may be regarded as a performance by the testator of some specific covenant to pay money or make a provision to take effect after his death. *Wathen v. Smith*, 4 Madd. 325, which is where the testator covenanted, by marriage settlement, that his heirs or personal representatives should pay his wife £1,000 within six months after his decease, and by will left her £1,000, to be paid within three months after his decease. The court held the legacy a satisfaction of the covenant, distinguishing it from *Chancey's Case*, 1 P. Wms. 408, and from *Haynes v. Mico*, 1 Br. C. C. 129. See also *Jones v. Morgan*, 2 Y. & Coll. Exch. 403.

general rule." And most of the early cases, wherein this very questionable, and as it seems to us unintelligible, rule, originated, are of a similar character. Where the debt, which was held to have been satisfied by the giving of a legacy of equal or greater amount, was rather a gratuity, or of an honorary character, and not strictly a pecuniary obligation, there is more plausibility in the conjecture, that the testator might have intended the gratuity on his part to balance the one against him. And we must admit that, while it seems not unnatural that such a rule should have been established in that class of cases, it does appear not a little strange and incomprehensible, how a rule founded upon that class of cases should come to be extended to all debts of every character.

3. The supposition, as a mere matter of natural presumption, founded upon fact and experience, that a debtor, giving his creditor a legacy, should intend it to be accepted in satisfaction of a merely pecuniary debt, as one for lent money, without any intimation of that kind, seems too preposterous to have even been seriously entertained by any one. The truth unquestionably is, that such a kind of presumption having been made in the courts of equity at an early day, in some cases of the peculiar character alluded to, instead of being treated as exceptional, was made the foundation of a general rule; and, by reason of making an exception the general rule, the courts have been occupied ever since in devising modes of escape from a false rule, by reason of the multiplication of exceptions. Whereas, if the rule had been stated, as it should have been, that, *prima facie*, the legacy was not a satisfaction of the debt, there would have been much less embarrassment upon the subject. We hope the American courts, feeling the incongruity of the English rule, will have the independence to reverse it, and to rule the law precisely opposite, and thus save much labor in defining the exceptions. For it is certain that very few courts will ever be content to treat a legacy from the debtor to his creditor as a satisfaction of his debt, unless so declared in the will; and that would prove the testator to have been a very singular man, to desire to characterize a mere payment of a pecuniary debt as a matter of bounty and generosity to his creditor.⁵

⁵ Lord *Alvanley* said, in *Hinchcliffe v. Hinchcliffe*, 3 Vesey, 516, 529, "Of all rules that have been adopted in this court, I should regret the rule that a legacy is a satisfaction of a debt, provided it is equal to the debt." But the rule is still acted upon. *Atkinson v. Littlewood*, L. R. 18 Eq. 595.

* 4. But as such a rule nominally exists in the courts of equity, it seems proper to state some of the leading exceptions which have been recognized. Thus it seems entirely well settled, that, where the legacy is of less amount than the debt, it shall not be held payment, even pro tanto: which upon principle it would seem it should be, if there is any soundness in the rule.⁶ So also if the amount of the legacy be equal to the debt or greater, yet if it be not payable in the same time, so as to be equally beneficial, it will not be presumptively payment.⁷ So also where the legacy and the debt are of different natures, either with reference to the subject-matter or the extent of interest, the former will not be held a satisfaction of the latter. The following cases will illustrate the point where the debt and legacy are of a different nature.⁸ A legacy of a specific chattel will not be a satisfaction of a debt unless accepted as such.⁹ Cases illustrating the proposition that the legacy to be a satisfaction of a debt must carry the same extent of interest, are the following.¹⁰

5. So, too, although the debt and legacy be of equal amount, and of the same nature, both as to the subject-matter and the extent of interest; yet if the legacy be expressed in the will, as given for a particular purpose, that will prevent it operating in satisfaction of the debt.¹¹ So also if the debt is contracted subsequent to the execution of the will, there will be no ground of presuming the legacy was intended to be received in satisfaction of the debt.¹² So where the legacy is contingent, and the debt not, there is greater reason for holding the debt not satisfied by the legacy.¹³

⁶ *Gofton v. Mills*, Prec. in Ch. 9; s. c. 2 Vern. 141; *Stanway v. Styles*, 2 Eq. Ab. 355, pl. 21; *Graham v. Graham*, 1 Ves. Sen. 262.

⁷ *Atkinson v. Webb*, Prec. in Ch. 236; *Nicholls v. Judson*, 2 Atk. 300; *Mathews v. Mathews*, 2 Ves. Sen. 635; *Clark v. Sewell*, 3 Atk. 96; *Haynes v. Mico*, 1 Br. C. C. 129; *Jeacock v. Falkener*, 1 Br. C. C. 295; *Foster v. Evans*, 6 Sim. 15; *Hales v. Darell*, 3 Beav. 324; *Wood v. Wood*, 7 id. 183; *Smith v. Lyne*, 2 Yo. & Coll. C. C. 345.

⁸ *Eastwood v. Vinke*, 2 P. Wms. 613; s. c. 2 Eq. Ca. Ab. 354, pl. 19; *Forsight v. Grant*, 1 Ves. Jr. 298; *Richardson v. Elphinstone*, 2 Ves. Jr. 463.

⁹ *Byde v. Byde*, 1 Cox, 44, 49.

¹⁰ *Alleyn v. Alleyn*, 2 Ves. Sen. 37; *Bartlett v. Gillard*, 3 Russ. 149.

¹¹ *Mathews v. Mathews*, 2 Ves. Sen. 635; *Drewe v. Bidgood*, 2 Sim. & Stu. 424.

¹² *Cranmer's Case*, 2 Salk. 508; *Thomas v. Bennet*, 2 P. Wms. 341; *Fowler v. Fowler*, 3 P. Wms. 353.

¹³ *Nicholls v. Judson*, 2 Atk. 300; *Crompton v. Sale*, 2 P. Wms. 553. Mr.

* 188 * So also if the debt was uncertain, as the balance of a running account, the courts consider that the testator could not have intended the legacy in satisfaction of it, since he could not have known there would be any debt due, and certainly not the amount of it.¹⁴ So also a debt due upon a negotiable bill of exchange has been held too transient to be presumably satisfied by a legacy.¹⁵

6. Indeed, in the language of Mr. Roper, "the court lays hold of any circumstance, however trifling, to raise a presumption that the testator did not intend the legacy as a satisfaction" of the debt.¹⁶ As where there is a direction in the will for the payment of debts and legacies, the courts seize hold of this slight and unnecessary, or matter of course, direction, as a ground of presumption that the testator did not intend the legacy should go in satisfaction of the debt.¹⁷

7. So also it has been held, that this precarious presumption is affected by the particular relation subsisting between the testator and his creditor. As where the creditor and legatee is the servant of the testator, it has generally been considered, that the presumption of payment will not apply.¹⁸ But this exception has been questioned by Lord *Eldon*,¹⁹ who in the case last cited decided the point upon the admissibility of parol evidence to rebut the presumption upon the face of the will; a decision not only questionable in itself, but far more obviously wrong than the dictum of Lord *Hardwicke*, which he thus escaped from considering. Sir *Edward Sugden*²⁰ said, "that upon the best consideration he had been able to bestow upon *Wallace v. Pomfret*, he said it with the greatest diffidence, he did not see how it was possible to maintain the decision consistently with the other authorities." And Lord *Talbot*, Chancellor, in *Fowler v. Fowler*,²¹ said, "Though in some

Roper (2 Legacies, 1047) seems to regard the decision in the last case referred to as virtually in subversion of the rule itself, and we think it evinces an entire disregard of it. See also *Pullen v. Cresy*, 3 Anst. 830; *Devese v. Pontet*, 1 Cox, 188; s. c. *Finch*, Prec. in Ch. 240, in note.

¹⁴ *Rawlins v. Powel*, 1 P. Wms. 297.

¹⁵ *Carr v. Eastabrooke*, 3 Vesey, 561.

¹⁶ 2 Roper, Leg. 1050; *Meredith v. Wynn*, Prec. in Ch. 312.

¹⁷ Lord *King*, Chancellor, in *Chancey's Case*, 1 P. Wms. 408; *Richardson v. Greese*, 3 Atk. 65; *Field v. Mostin*, Dick. 543.

¹⁸ Lord *Hardwicke*, in *Richardson v. Greese*, 3 Atk. 65.

¹⁹ *Wallace v. Pomfret*, 11 Vesey, 542.

²⁰ In *Hall v. Hill*, 1 Dr. & War. 94, 123.

²¹ 3 P. Wms. 353, 354.

cases * parol evidence had been allowed in order to show * 189 that the testator designed to give such legacy exclusive of the debt, yet his lordship's opinion was, not to admit such evidence, for then the witnesses, and not the testator, would make the will." ²²

8. It seems to have been regarded as a general rule between parent and child, that where the debt due from the father was in the nature of a portion or gratuity, but not otherwise, a legacy of equal or greater amount shall be deemed a satisfaction; and it seems to us that the presumption here stands upon much more satisfactory grounds than in the common case. ²³

9. It seems to be settled that a legacy by the creditor to his debtor shall not be treated as a presumptive release of the debt, unless there is some special ground for presuming such must have been the intention of the testator. ²⁴ But it was decided in a late case, ²⁵ by Sir *J. Romilly*, M. R., that the legacy of the creditor to his debtor might be retained by his executors in payment of the debt, pro tanto, although barred by the statute of limitations. The exceptions here are considerably numerous; but

²² Ante, pt. 1, § 39, n. 6.

²³ Lord *Alvanley*, in *Tolson v. Collins*, 4 Vesey, 483; *Hinchcliffe v. Hinchcliffe*, 3 Vesey, 516. It is here said, the court will lay hold of any little circumstances to get out of the rule, that a debt is satisfied by an equal legacy. See also *Plume v. Plume*, 7 Vesey, 258, *Plunkett v. Lewis*, 3 Hare, 316, where the authorities upon this point are extensively reviewed, and the result reached that "they clearly decide, that neither the expression of natural love and affection as the reason of the gift, nor the ignorance of the husband of his wife's rights, will necessarily prevent the application of the doctrine of satisfaction;" and in a subsequent part of his judgment his Honor observed, "I must not, however, be understood as intimating an opinion, that the expression of natural love and affection, as the consideration of a portion given by a parent on the marriage of a child, may not, in any case, be entitled to weight. In the case of a portion being the exact amount of the parent's debt to his child, perhaps it might be material, at least in conjunction with other circumstances; for it might be said, that natural love and affection could not be the motive for discharging a legal or equitable obligation: but that reasoning can have little weight, where the father, as in this case, gives a portion so far exceeding his liability. There is here ample to satisfy the natural love and affection, without excluding the presumption that the debt was intended to be satisfied also."

²⁴ 2 Roper, 1063, 1064.

²⁵ *Coates v. Coates*, 10 Jur. N. S. 532; S. C. 12 W. R. 634; S. P. *Courtenay v. Williams*, 3 Hare, 539.

by reason of the rule itself having been first established upon the proper basis, it is far less embarrassed by infinitesimal re-
 * 190 finements * upon the exceptions than in the case which has been discussed in the preceding part of this section. Lord *Loughborough*, Chancellor,²⁶ admitted evidence of the state of the testator's books and papers, and even of his declarations in conversation, but with great hesitation, and finally relied exclusively upon the state of writings left by the testator, but the decree was in favor of the release of the debt. So the memorandum by the testator, that the legatee should "pay no interest, nor shall I ever take the interest unless greatly distressed," was held sufficient ground for treating the debt as discharged in *Aston v. Pye*, here cited with approbation.²⁷

10. The general rule and the exceptions which have obtained in the courts of equity will be found extensively discussed in Mr. Roper's work on Legacies; but we shall not here go much into the detail.²⁸

²⁶ *Eden v. Smyth*, 5 Vesey, 341, 347.

²⁷ It is possible there may be sufficient reason for receiving parol evidence, even of the testator's declarations, in regard to his general intention to remit a debt due him from one to whom he had given a legacy in his will, without impugning the rule against admitting such evidence in aid of the construction of the will. Ante, pt. 1, § 39, pl. 3. And it has always seemed to us that where the declarations of the testator have been received, in regard to his intention in giving a legacy, the ground of the admission was not fairly and fully stated. The true ground seems to be that the issue being upon the fact of the payment of the debt, any declaration affecting that point is admissible. Thus, if the testator is the creditor, all his declarations in regard to the fact and grounds of the release, discharge, or payment of the debt, are competent to be received as those of a party. If the testator be the debtor, and it is attempted to show that he intended a legacy as payment of his debt (a very improbable intention), it is competent to prove any declarations of the testator contemporaneously with the giving of the legacy, as part of the *res gestæ*. We think it not improbable that the admissibility of this kind of evidence in cases of this peculiar class, has been made to rest upon some such undefined basis, without much examination by the courts, in the more recent cases. But whenever the question has been raised, we generally find, that doubts have been suggested as to the consistency of the rule with the general principles of evidence. And it seems to us, that, unless it be placed upon some such grounds as those just stated, it will be difficult to defend this exception to the general rules of evidence.

²⁸ 2 Roper, 1064, 1065, 1070. See also *Wilmot v. Woodhouse*, 4 Br. C. C. 227; *Jeffs v. Wood*, 2 P. Wms. 128; *Courtenay v. Williams*, 3 Hare, 539; *Hyde v. Neate*, 11 Jur. 259; s. c. 15 Sim. 554. It seems no question has ever been

* 11. It seems to have been considered from an early day * 191 that the appointment by the creditor of his debtor to be his executor would operate as a release of the debt at law,²⁹ since that consisted in a right of action, and by uniting the rights of debtor and creditor in one person there could be no mode of instituting an action at law. And the rule is the same if the creditor appoint one of his joint debtors, or of his joint and several debtors, his executor, or one of his executors.³⁰ And it will not prevent the operation of the release, at law, that the executor dies before the probate of the will.³¹ But it has been said, if the executor renounce the office it will prevent the release taking effect.³² It seems to be considered that the mere nomination of one executor, and the decease of the testator, operates to release the debts due from such person to the testator, so that, if the payee of a promissory note appoint the maker his executor, the note is so completely extinguished, that no action can be maintained upon it in the name of another person to whom the executor assigns it.³³

made, that if the will contained express words of discharge or release from the debt, it will be thereby extinguished, unless the debtor die in the lifetime of the testator, whereby the legacy lapses, and the debt still remains a subsisting obligation. *Elliott v. Davenport*, 2 Vern. 521. See also *Sibthorp v. Moxom*, 3 Atk. 580. So if the legacy be of the debt to one of two joint debtors, and the legatee die before the testator, the debt remains good against his personal representative and the contractor. *Izon v. Butler*, 2 Price, 34; *Maitland v. Adair*, 3 Vesey, 231. Where the will recites that the legatee is indebted in a certain sum which the testator forgives him, the recital binds the legatee, and he must elect either to take under the terms of the will, or independently. *Robinson v. Bransby*, Madd. & Geld. 348. The American cases, generally, follow the line marked by the English cases. *Williams v. Crary*, 8 Cowen, 246; *Fitch v. Peckham*, 16 Vt. 150; *Strong v. Williams*, 12 Mass. 391. And if the legacy be intended as payment, it will so operate, although the case does not come within the general rule upon the subject. *Williams v. Crary*, supra; *Van Riper v. Van Riper*, 1 Green, Ch. 1; *Clarke v. Bogardus*, 12 Wend. 67; *Zeigler v. Eckert*, 6 Penn. St. 13; *Phillips v. McCombs*, 53 N. Y. 494.

²⁹ *Nedham's Case*, 8 Co. 135 a; 2 Wms. Ex'rs, 1180.

³⁰ *Cheetham v. Ward*, 1 B. & P. 630; *Fowell v. Forrest*, 2 Saund. 47 s, and notes; *Dorchester v. Webb*, Cro. Car. 372.

³¹ *Wankford v. Wankford*, 1 Salk. 299; 2 Wms. Ex'rs, 1181.

³² *Holt*, Ch. J., in *Wankford v. Wankford*, 1 Salk. 299, 307.

³³ *Freakley v. Fox*, 9 B. & C. 130. And the same rule applies in all cases where the debtor and creditor interests become united in the same person, as where a bill of exchange, when it becomes due, is in the hand of the acceptor, or of one of the acceptors. *Harmer v. Steele*, 4 Exch. 1.

12. But it is not needful to pursue this inquiry further, since, in equity, the executor is held to have paid the debt to himself, which makes him accountable for the amount, as assets in his hands, * to any party entitled to claim them.³⁴ And the same rule obtains in the American courts both of probate and equity. And the rule at law does not apply to the appointment of the debtor as administrator, since that is the act of the law and not of the creditor,³⁵ and at most only operates as a temporary suspension of the remedy.

13. In looking carefully into the American cases upon this subject, it will appear that the courts here have received the rule of the English courts with considerable hesitancy. Thus, in the very early case,³⁶ *Putnam, J.*, said: "All the cases agree that the intention of the testator ought to prevail, and that, prima facie at least, whatever is given in a will is to be intended as a bounty. But by later cases the courts have not been disposed to understand the testator as meaning to pay a debt, when he declares that he makes a gift; unless the circumstances of the case should lead to a different conclusion." This is all for which we contend; and we think the same view is largely countenanced by many other American cases.³⁷

14. And in another case,³⁸ it is said that the presumption that a legacy is intended as payment of a debt is one peculiar to courts of equity, and is not, therefore, strictly a legal presumption; and that where the testator has estate sufficient to be generous as well as just, and the language of his will does not import that a legacy or bequest is a payment, the gift will be regarded as a donation;

³⁴ Lord *Tenterden*, Ch. J., in *Freakley v. Fox*, 9 B. & C. 130.

³⁵ *Wankford v. Wankford*, 1 Salk. 299, 303, 306. The effect of the debtor making his creditor executor is sufficiently considered. Post, pt. 3, Payment of Debts; 2 Wms. Ex'rs, 1186-1188; *Finch v. Houghton*, 19 Wisc. 149.

³⁶ *Strong v. Williams*, 12 Mass. 391, 393.

³⁷ *Chapman, J.*, in *Smith v. Smith*, 1 Allen, 129, 130; *Clarke v. Bogardus*, 12 Wend. 67; *Mulheran v. Gillespie*, id. 349; *Fort v. Gooding*, 9 Barb. 371; *Smith v. Marshall*, 1 Root, 159; *Perry v. Maxwell*, 2 Dev. Eq. 488; *Dey v. Williams*, 2 Dev. & Batt. Eq. 66. See also *Edelen v. Dent*, 2 G. & J. 185; *Byrne v. Byrne*, 3 S. & R. 54; *Adams v. Lavender*, 1 M'Clel. & Y. 41; *Errington v. Evans*, 2 Dick. 456; *Philips v. Philips*, Ch. Ca. 292; *Gould v. Adams*, Vern. & Scriv. 258; *Ladson v. Ward*, 1 Desaus. 314; *Caldwell v. Kinkead*, 1 B. Mon. 228; *Carey v. Goodinge*, 3 Br. C. C. 110.

³⁸ *Cloud v. Clinkinbeard*, 8 B. Mon. 397, 399.

but that parol evidence is not admissible in such cases to show the intention of the testator.

15. From this favorable inclination of the American courts we * think it fair to conclude that the rule of the * 193 English courts of equity will be here reversed, and a legacy will not be allowed to operate as a satisfaction of a debt, except in that peculiar class of debts which are of an honorary character, or originally grew out of gratuities, or were in the nature of portions or advancement; or else where there is enough in the terms of the bequest, construed with reference to the relations of the parties, to indicate such an intention. Where there is a special charge of the debt upon the bequest, there is no occasion to resort to construction or presumption.³⁹

16. Advancements to children will not be allowed towards legacies, unless there is something in the will clearly indicating such an intention.⁴⁰ But a devise of real estate, although informal, if accepted by the devisee, may be construed in satisfaction of an obligation to make a settlement upon the devisee, when it is apparent such must have been the intent.⁴¹ But this is by no means a uniform presumption.⁴²

SECTION XI.

SATISFACTION OF PORTIONS BY LEGACIES.

1. The subject of less importance here, but not wholly unimportant.
2. A legacy is presumably in satisfaction of a stipulated portion.
3. The question of satisfaction being quite aside of the construction of the will, parol evidence is held admissible in regard to it.

³⁹ *Smith v. Smith*, 1 Allen, 129; *Ward v. Coffield*, 1 Dev. Eq. 108.

⁴⁰ *Kreider v. Boyer*, 10 Watts, 54.

⁴¹ *Bryant v. Hunters*, 3 Wash. C. C. 48.

⁴² *Goodfellow v. Burchett*, 2 Vern. 298; *Stocken v. Stocken*, 4 Sim. 152; *Fourdrin v. Gowdey*, 3 My. & K. 383, 409; *Lethbridge v. Thurlow*, 15 Beav. 334. It is said in *Thynne v. Glengall*, 2 Ho. Lds. 131, that equity leans against holding a legacy a satisfaction of a debt, but in favor of holding it a satisfaction of a portion. But a legacy of equal amount with the principal sum promised by the testator with interest at his death will not be applied in payment of the principal sum, unless such appears to be the intent. *Parker v. Coburn*, 10 Allen, 82.

4. Slight variations will not hinder the legacy operating as satisfaction; but if it be conditional, or contingent, it will not so operate.
5. A legacy may be regarded as an advancement towards the portion made during the life of the testator, but not so a distributive share in his estate.
- n. 6. But a distributive share may be reckoned in part performance of a covenant to leave one a portion at his decease.
6. Settlements or portions presumptively satisfied by legacies.
7. How far the *lex loci* applies.

* 194 * § 11. 1. THE subject of this section is one of far less importance at the present time, and doubtless will so remain to a considerable extent, in this country, than in England. Here marriage settlements, and marriage or other portions, are, and have always been, comparatively of infrequent occurrence. But as they do constantly occur, and are likely to increase with the advance of time and the increase of wealth, it seems scarcely allowable that the subject should be entirely passed over here.

2. The general rule seems to be, where the testator was under obligation to provide a portion for the same person to whom he leaves a legacy of the same or greater amount, and sometimes where the legacy is of less amount than the stipulated portion, that the legacy shall be regarded as intended in satisfaction, either in whole or in part, of the portion. This will be illustrated by the following cases.¹

3. And it seems to be considered, that, as the question of satisfaction is one of presumption, upon all the circumstances of the case, and quite independent of the construction of the will, or the particular legacy in question, parol proof may be received to confirm or oppose the presumption, the same as upon any other matter of fact.²

¹ Bruen *v.* Bruen, 2 Vern. 439; Blois *v.* Blois, 2 Vent. 347; Moulson *v.* Moulson, 1 Br. C. C. 82; Copley *v.* Copley, 1 P. Wms. 147; Ackworth *v.* Ackworth, 1 Br. C. C. 307, and note; Byde *v.* Byde, id. 309; Somerset *v.* Somerset, id. 309, and note; Warren *v.* Warren, id. 305; Finch *v.* Finch, 1 Ves. Jr. 534; Hinchcliffe *v.* Hinchcliffe, 3 Vesey, 516; Sparkes *v.* Cator, id. 530; Pole *v.* Somers, 6 Vesey, 309; Bengough *v.* Walker, 15 Vesey, 507; Williams *v.* Bolton, 1 Dick. 405. The same construction obtains in America. Taylor *v.* Lanier, 3 Murph. 98. On the general construction of the will, and by comparing its provisions for others in the same relation, the intent to have the portions separate and independent is often seen. Paget *v.* Grenfell, Law Rep. 6 Eq. 7.

² Jeacock *v.* Falkener, 1 Br. C. C. 295; Haynes *v.* Mico, id. 129; Hinch-

4. It is said that slight circumstances of variation will not hinder legacies from being considered a satisfaction of portions due the legatee from the testator.³ But where the portions are * absolute and unconditional, it seems to have been consid- * 195 ered that a legacy which was only payable upon certain conditions, and in certain contingencies, could not properly be treated as a satisfaction of the portion.⁴

5. Where portions had been secured for children, and it was provided that any advancement by the settlor, or parent, to such children during their lives, should be taken in satisfaction, in whole or in part, of such portions, unless the contrary should be specially declared by such parent, it has been often decided, that a legacy by the last will of such parent should be reckoned towards such portion.⁵ But in *Twisden v. Twisden*,⁶ it was decided by

cliffe v. Hinchcliffe, 3 Vesey, 516; *Pole v. Somers*, 6 Vesey, 309; *Weall v. Rice*, 2 Russ. & My. 251; *Kirk v. Eddowes*, 3 Hare, 509; *Hall v. Hill*, 1 Dr. & War. 94. See also *Taylor v. Lanier*, 3 Murph. 98.

³ 2 Roper, 1093.

⁴ *Bellasis v. Uthwatt*, 1 Atk. 426; *Saville v. Saville*, 2 Atk. 458; *Hanbury v. Hanbury*, 2 Br. C. C. 352, 375.

⁵ *Rickman v. Morgan*, 1 Br. C. C. 63; s. c. 2 id. 394; *Leake v. Leake*, 10 Vesey, 477; *Onslow v. Michell*, 18 Vesey, 490; *Goolding v. Haverfield*, M'Cl. Exch. 345; *Papillon v. Papillon*, 11 Sim. 642. But in *Cooper v. Cooper*, 21 W. R. 921, s. c. L. R. 8 Ch. 813, this question was carefully reviewed by the full Court of Chancery Appeal, and it was held that the question, how far a bequest by will can be treated as an advancement towards a portion or provision for such legatees, must be determined as matter of construction, depending upon the words used. The learned judges here questioned whether the cases cited in this note really justified the propositions of the text, although recognizing the fact that the cases had been so received by the profession. The words of Lord Chancellor *Selborne* are worthy of his lordship's eminent reputation for learning and wisdom, and the highest sense of justice. "But, when examined, these cases are found to present a most remarkable example of the extraordinary manner in which the use of precedents has sometimes caused the courts of this country, first to slide into manifest error, and afterwards to follow that error, under the notion that they are bound to do so."

⁶ 9 Vesey, 413. There are many cases where a benefit derived by way of distributive share in one's estate has been held to be a good performance of a covenant to leave the party a given sum at his death. *Blandy v. Widmore*, 1 P. Wms. 323; *Garthshore v. Chalie*, 10 Vesey, 1; *Goldsmid v. Goldsmid*, 1 Swanst. 211. See also *Colleton v. Garth*, 6 Sim. 19; *Jesson v. Jesson*, 2 Vern. 255; *Thomas v. Kemeys*, id. 348. A legacy payable one year after the marriage of the legatee is not to be regarded as a marriage portion, but is a vested legacy; and any payment by the executor to the legatee, although not

Lord *Eldon*, that a distributive share in the parent's estate could not be reckoned by way of advancement towards the portion, during the life of the parent.

6. Where the testator by his will made provision for his children, being at the same time seized of lands under his marriage settlement by which a contingent or residuary provision was made for his eldest son, and upon the marriage of the elder son a common recovery was suffered in regard to the estate embraced in the marriage settlement in order to raise a sum of money exceeding that named in the will for the younger son, in the event of his surviving the elder son, this was held to be substitutionary for the provision made in the will, and that the younger son could not claim both.⁷ And legacies exceeding agreed or contemplated portions are generally construed * as being in satisfaction if adequate and accepted.⁸ And if for a less amount, then as satisfaction pro tanto.⁹

7. And where the marriage settlement and the will were made in England, where the parties reside, although made in conformity with the law of Scotland, and with reference to the married parties residing there, it was held that the English presumption against double portions was applicable, and that the will operated as a satisfaction.¹⁰

at the time specified, will be reckoned towards the legacy whenever it becomes payable. *Boone v. Sinkler*, 1 Bay, 369. See also *Lee v. Cox*, 3 Atk. 419; *Wilcocks v. Wilcocks*, 2 Vern. 558.

⁷ *Hartopp v. Hartopp*, 17 Vesey, 184. See also *Trimmer v. Bayne*, 7 Vesey, 508.

⁸ *Duke of Somerset v. Duchess of S.*, 1 Br. C. C. 309, and note.

⁹ *Onslow v. Michell*, 18 Vesey, 490; *Glengal v. Barnard*, 1 Keen, 769; *Tubbs v. Broadwood*, 2 Russ. & My. 487.

¹⁰ *Campbell v. Campbell*, Law Rep. 1 Eq. 383; s. c. 12 Jur. n. s. 118.

SECTION XII.

THE EFFECT OF MAKING REQUESTS FOR THE SOLE OR SEPARATE USE OF MARRIED WOMEN.

1. It was one time doubted if the husband's control of legacies could be barred.
But it is now clearly established.
2. Different forms of expression excluding the control of the husband.
3. There must be a clear expression of intention to that effect.
4. An elaborate case showing what acts of the husband will create a gift to the wife.
5. If the wife consent to have the husband receive the money, it will bind her.
6. The trustee not obliged to pay the money to the husband at wife's request may pay it into court.
7. The court will sometimes retain the corpus of the fund, and direct the income paid wife.
8. Construction of one bequest aided by another.
9. Power to advance for one purpose not extended to others.

§ 12. 1. IT seems to have been doubted, at an early day, how far it was competent to secure pecuniary legacies from the control of the husband.¹ But the affirmative of the proposition was early conceded.²

2. There are many forms of expression, not precisely amounting to that, which are well understood as implying it, as that "her receipt shall be a sufficient discharge to the executors,"³ or "for the livelihood of the wife,"⁴ or "for her own use."⁵ And the * courts incline to extend the bar of the husband's con- * 197 trol to that of any future husband.⁶ Any form of expression which fairly indicates the desire of the testator that the legatee, being a woman, should hold exclusive control of it, will be upheld in courts of equity.⁷ But the exclusion of the control of the mother

¹ *Harvey v. Harvey*, 1 P. Wms. 125.

² *Bennet v. Davis*, 2 id. 316.

³ *Lee v. Prieaux*, 3 Br. C. C. 381; *Cooper v. Wells*, 11 Jur. n. s. 923.

⁴ *Darley v. Darley*, 3 Atk. 399.

⁵ *Adamson v. Armitage*, 19 Vesey, 416, 419; *Inglefield v. Coghlan*, 2 Coll. C. C. 247; *Ex parte Killick*, 3 M. D. & DeG. 480.

⁶ *Steedman v. Poole*, 6 Hare, 193.

⁷ *Prichard v. Ames*, Turn. & Russ. 222.

of the legatee will not be extended to the husband.⁸ At a very early day a legacy to a married woman, to be laid out by her in what she should think fit, in remembrance of testator, was held to be for her separate use.⁹

3. But to prevent the marital control over property belonging to a married woman, a clear intention that it shall be to her separate use must appear. A mere trust to pay the interest for life was held to be insufficient. But the capital being bequeathed according to her appointment, whether covert or sole, and in default thereof to her representatives, including her husband, is sufficient to create a separate control.¹⁰ But where the will contained a bequest to a married woman, "for her sole and separate use and benefit," and afterwards a bequest of the residue "for her own use and benefit," the residue was held not to be the separate estate of the wife.¹¹ Where the husband disclaims all control, that will legalize the disposition of the wife, even where her right to separate control is questionable.¹² But some of the American cases have required very clear expressions of intention to create a separate estate in married women.¹³ But a bequest to trustees for the sole use and benefit of testator's wife held to create a separate estate;¹⁴ so of a bequest to daughters "not to belong to their present or future husbands."¹⁵ But "to her and the heirs of * 198 * her body, and them alone," held not sufficient.¹⁶ Nor the expression "entirely for her and her children."¹⁷ Where the husband's control is in terms excluded, there can be no question.¹⁸ So "to remain in her possession and special use and benefit

⁸ *Massey v. Parker*, 2 My. & K. 174.

⁹ *Atcherley v. Vernon*, 10 Mod. 518, 531. See *Wagstaff v. Smith*, 9 Vesey, 520; *Gilchrist v. Cator*, 1 DeG. & S. 188. A bequest to pay into the proper hands of a married woman, held to be for her separate use. *Hartley v. Hurle*, 5 Vesey, 540, 545. A legacy independent of any other person will have the same effect. *Margetts v. Barringer*, 7 Sim. 482; *Bain v. Lescher*, 11 Sim. 397; *Ker v. Ruxton*, 16 Jur. 491.

¹⁰ *Lumb v. Milnes*, 5 Vesey, 517.

¹¹ *Wills v. Sayers*, 4 Madd. 409; *Roberts v. Spicer*, 5 Madd. 491.

¹² *Rycroft v. Christy*, 3 Beav. 238.

¹³ *Stevenson v. Schriver*, 9 Gill & J. 324; *Crawford v. Shaver*, 2 Ired. Eq. 238.

¹⁴ *Jarvis v. Prentice*, 19 Conn. 272.

¹⁵ *Jones v. Jones*, 7 Ga. 76.

¹⁶ *Foster v. Kerr*, 4 Rich. Eq. 390.

¹⁷ *Furlow v. Merrell*, 23 Ala. 705; *Nimmo v. Davis*, 7 Texas, 26.

¹⁸ *Nix v. Bradley*, 6 Rich. Eq. 43.

during life, and at her death to go to her children, and for no other use whatever," creates a separate estate.¹⁹

4. There is a carefully considered case, where the husband having subscribed for shares in the stock of the bank, and, on paying the instalments, he stated that the shares were his wife's, and that she would have something to live upon if he should spend all his property. He took receipts as for payments made by her, which payments were entered in the books of the bank as made by the wife, and a certificate was issued to her as the owner of the shares. The husband afterwards purchased shares in the same bank, in his own name, and sometimes pledged the same to the bank as security for loans made to him, but never so pledged or proposed to pledge the shares that stood in his wife's name. He received dividends as long as he lived on the shares that stood in his own name, and on those standing in his wife's name, and always requested the cashier to hand him the money in two separate parcels; and he sometimes asked for particular kinds of money for his wife in payment for the dividends on the shares that stood in her name. It was held, on the husband's decease, that the wife was entitled, as against the next of kin, to hold the shares that stood in her name as her own property, there having been a gift thereof to her by the husband, valid as against all persons except his creditors.²⁰

5. But where the wife allows the husband to receive money given to her separate use, and to expend it partly in the support of his family and partly in his business, mixing it with his other funds and keeping no separate account of it, no question whatever being made by the wife during her husband's life, she cannot claim to have it repaid to her out of his estate.²¹

6. The trustee is not obliged to pay the money to the husband, even at the wife's request, but may pay it into court, and take the * direction of the court as to the disposition of the * 199 money, and will be allowed his costs.²²

7. And the court will sometimes retain money bequeathed to the separate use of a married woman, and direct that the net income

¹⁹ *Freeman v. Flood*, 16 Ga. 528.

²⁰ *Adams v. Brackett*, 5 Met. 280.

²¹ *Gardner v. Gardner*, 1 Giff. 126.

²² *Swan*, in re, 10 L. T. N. S. 334; s. c. 12 W. R. 738.

only be paid to her.²³ Where the testator directed that his daughters' shares should be settled on themselves strictly, it was held that the income of each daughter's share, during the joint lives of herself and husband, should be paid to her without power of anticipation. If she survived her husband, she should take the share absolutely; and if not, it would go as she appointed by her will, or, in default thereof, to her next of kin.²⁴

8. The bequest of a legacy to trustees to invest and pay the dividends to the testator's unmarried niece for life, for her own separate use and benefit, free from the control of any husband she may marry, followed by a bequest of the residue to the same niece "for her own use and benefit absolutely," was held a good gift of the residue to the separate use of the niece.²⁵

9. Where the will gives a power of advancement to the legatees for setting up testator's children, this will not justify the trustees in advancing the share of a married daughter to pay her husband's debts. But where a share was advanced for the purpose of setting up a married daughter in farming business, the husband covenanting that it should be for her separate use, it was held a good execution of the power.²⁶

ERRORS IN THE DESCRIPTION OF THE LEGATEE.

1. The name, or a portion of the description, may be rejected, if that will leave the intent clear.
2. The description will often aid, where the name is imperfect or erroneous.
3. A false character attributed to the legatee will not defeat the legacy, unless the testator has been misled.

§ 13. 1. WE have said so much in former portions of the work in regard to erroneous descriptions of the devisee or legatee, that it would not be allowable here to discuss the subject much in

²³ Sarel, in re, 10 L. T. N. S. 691; s. c. 10 Jur. N. S. 876.

²⁴ Loch v. Bagley, Law Rep. 4 Eq. 122.

²⁵ Tarsey's Trust, Law Rep. 1 Eq. 561. A legacy to the wife "to her own use and benefit:" held, that these words cannot mean sole and separate use. Foley v. Foley, Irish, Ch. App. 18 W. R. 81.

²⁶ Talbot v. Marshfield, L. R. 3 Ch. App. 622, varying the decree below.

detail. It seems to be well settled that if either the name or the description sufficiently identify the legatee to the common apprehension of his acquaintances, it will be sufficient to enable him to take. Thus where the bequest was to "my namesake Thomas, second son of my brother John," there being no son Thomas, it will be established in favor of the second son, whose name was William.¹ And a bequest "to my nearest surviving relatives, in my native country, Ireland," was held to entitle all the testator's brothers and sisters, being his nearest of kin, to take, without reference to residing in Ireland, that portion of the description, being merely that of residence, not being essential to the identification.²

2. But as we have elsewhere stated, the description will yield to the name, where both apply, but to different persons. As where the bequest was to my nephew John Newbolt, second son of the Rev. W. S. N., vicar of Somerton, the vicar of Somerton being the testatrix's brother-in-law, named W. R. N., and his second son was called R. H. N., and his third son John Rice Newbolt, it was held a good bequest to the third son.² And where a bequest was made * to testator's six grandchildren, the name of one * 201 being omitted, and that of another repeated, it was held all should take.³

3. A false character attributed by the testator to the legatee will not defeat the legacy, unless the testator has been fraudulently misled in regard to the matter, and thus induced to give the legacy, when if he had not been deceived he might not have done so. If the parties are equally cognizant of the facts, any such occurrence

¹ *Stockdale v. Bushby*, 19 Vesey, 381; ante, pt. 1, § 40, n. 2.

² *Newbolt v. Pryce*, 8 Jur. 1112; 14 Sim. 354. See also *Meredith*, in re, 10 L. T. n. s. 565; *Standen v. Standen*, 2 Ves. Jr. 589. And where the testator named the person to whom he was betrothed, and his intended marriage with her, and by a codicil gave a legacy of £3,000 to his wife, he having died before the actual marriage, the lady was held entitled to the legacy. *Schloss v. Stibel*, 6 Sim. 1. And it is said in *Smith v. Smith*, 4 Paige, 271, that no amount of misdescription of the legatee, by name or otherwise, will defeat the intention of the testator, if that can fairly be ascertained from the language of the will, as applied to the existing facts, by the aid of surrounding circumstances. See the very able opinion of Lord *Selborne*, Chancellor, in *Hardwick v. Hardwick*, L. R. 16 Eq. 168, applying the same rule to errors in the description of the estate devised. See *Gillett v. Gane*, 18 W. R. 423; *Read v. Clarke*, 109 Mass. 82.

³ *Garth v. Meyrick*. 1 Br. C. C. 30.

will not affect the validity of the bequest.⁴ A lady who had gone through the ceremony of marriage with the testator, supposing at the time, as did the testator, that her former husband was dead, was held entitled to a legacy by the description of his wife.⁵

SECTION XIV.

BEQUESTS BY INFERENCE OR IMPLICATION.

1. A bequest will be upheld according to the manifest intent, although not precisely according to the literal import of the words.
2. Further cases and illustrations of the rule.
3. Additional legacy subject to same terms, as first, by implication.
4. Such an implication must not rest upon conjecture, nor need the conclusion be irresistible.
5. Bequests of residue to wife for life by implication. Legacies increased by reference.
6. Condition being in alternative, failure to perform one leaves the other in force.
7. A devise implied without any words, when intent very clear on whole will.
8. Devise by implication from a devise over after the death of one named.
9. Bequest during the lives of two or more construed to extend to life of the survivor.
10. Bequest to one, and if he dies without issue then over, creates no estate in the issue.
11. And the same rule holds in a devise to one and then over, on the death of that one and her husband. There is no devise to the latter.
12. An estate over on tenant for life dying unmarried takes effect on the death of tenant for life, although not unmarried.
13. Implications often arise from elliptical forms of expression.
14. Devise to trustee implied from the necessity of the trusts imposed.
15. Explicit bequest will always prevail over a later one by mere implication.
16. Grounds upon which bequests will be raised by implication.
17. Direction to pay interest implies accumulation.
18. Other grounds of implication, or the contrary.
19. Bequest to husband on death of wife implied.
20. Cross-remainders created by implication.
21. Legacy absolute by implication.

* 202 * § 14. 1. THE cases are considerably numerous where the provisions of the bequest, as applied to the facts subsequently occurring, show that although the precise state of facts anticipated by the testator, and described as the conditions upon

⁴ *Giles v. Giles*, 1 Keen, 685.

⁵ *Pitts*, in re, 5 Jur. n. s. 1235.

which the devise or legacy was to take effect, have not occurred, or have not occurred exactly as expected by him, there is still no question, that, according to the obvious intention of the testator, the bequest should be upheld. Thus it was declared in one case,¹ that where a testator manifests a clear intention to give a benefit to certain objects, in an event which happens, the legatees shall not be deprived of it, because a circumstance inadvertently coupled with it, in the language used, does not literally take place. Therefore under a bequest to two grand-daughters by name of equal sums for life, and their children respectively, but if either died without issue her share should go to the children of the surviving one, and one marries and dies leaving children, and subsequently the other dies unmarried, the children of the first were held entitled, although not, in the terms of the will, children of the "surviving grand-daughter."

2. So too on a bequest to three daughters, payable at their respective ages of twenty-one or marriage, and if all die before that age, then all to the mother, two of them so dying, held, that the survivor having obtained that age should take the whole.² And upon a bequest to two, and upon the death of either unmarried, the whole to the survivor, and one married and died without issue, held, that the survivor was entitled, thus construing *without issue* as equivalent to "unmarried."³

3. So too a legacy by codicil will be often construed as subject to the same implications as a former one given by the will, it being expressed to be given in addition to what had been given by will. (a) And when the full effect is made dependent upon the marriage of the legatee, this means marriage at any time, as well after as before the decease of the testator.⁴

4. It seems to have been considered at an early day, that in order to create a devise or legacy by implication the presumption * must be so free from doubt as to leave no hesi- * 203
tation in the mind of the court. But it need not be such

¹ Harman v. Dickenson, 1 Br. C. C. 91.

² Scott v. Bargeman, 2 P. Wms. 68. See also Hill v. Smith, 1 Swanst. 195; Peat v. Powell, 1 Eden, 479; Hale v. Beck, 2 id. 229; Hamley v. Gilbert, 1 Jac. 354.

³ Doyne v. Cartwright, 1 Coll. C. C. 482.

(a) Ante, vol. 1, p. 291; vol. 2, p. 122.

⁴ Crowder v. Clowes, 2 Ves. Jr. 449; Davies v. Hopkins, 2 Beav. 276.

that no man could raise any doubt; but it must not be a case of mere slight probability, but something in regard to which most men would not be expected to raise any question.⁵ It must not rest upon conjecture.⁶ Neither is it required that the inference should be absolutely irresistible. It is enough if all the circumstances taken together leave no doubt in the mind of the court.⁷

5. Where the husband willed the residue of his estate to his wife, to be distributed by her among his relatives as she deemed they might deserve, it was held to have reference to a distribution after her decease, and that the wife took a life-estate in the residue by implication.⁸ A bequest of £500, in addition to £1,500 before bequeathed the legatee, the former legacy being but \$1,000, was held to entitle the legatee to £2,000, as we have before seen.⁹

6. On a bequest to trustees to pay the father certain dividends for the maintenance of his daughter until she attained twenty-one or married with his consent, and she married before twenty-one without his consent, it was held she was entitled to the dividends till twenty-one.¹⁰

7. On a devise to R., until his eldest son T. shall attain twenty-one and no longer; but if T. shall die during his minority, then to J. or O., his younger brothers, or either surviving and attaining twenty-one; here, although there is no bequest to the eldest son, it seems entirely clear that such must have been the intention, and it was so held.¹¹

8. A direction that every thing shall remain as it now is during the life of the testator's wife, was held to give her a life-interest in all by implication.¹² And the gift of a life-interest in the estate to the testator's widow, with the direction, that, if the property

⁵ *Brummel v. Prothero*, 3 Vesey, 111, 113, by Sir R. P. Arden, M. R.

⁶ *Cave v. Holford*, 3 Vesey, 650, 676.

⁷ *Hartley v. Hurle*, 5 Vesey, 540; *Bootle v. Blundell*, 19 Vesey, 517; *Gittins v. Steele*, 1 Swanst. 28; *Wilkinson v. Adam*, 1 V. & B. 466. The words must admit of no other implication in order to justify making a bequest. *Ridgely v. Bond*, 18 Md. 433; *Grout v. Hapgood*, 13 Pick. 164; *Rogers v. Rogers*, 2 Head, 660. See also *Jackson v. Billinger*, 18 Johns. 368.

⁸ *Hudlestone v. Gouldsbury*, 11 Jur. 464; 14 Beav. 547. s. p. *Cock v. Cock*, 21 W. R. 807.

⁹ *Ante*, § 6, pl. 11; *Hall v. Lietch*, 18 W. R. 423.

¹⁰ *Camac's Trusts*, 12 Jur. 470.

¹¹ *Goodright v. Hoskins*, 9 East, 306.

¹² *Thorp v. Owen*, 2 Hare, 607.

was * more than she required for her support, she should * 204 give weekly the remainder to her two daughters, was held an absolute bequest to the widow.¹³ The wife takes a life-estate by implication in property devised, after her decease, to the testator's children.¹⁴

9. Bequests to two or more during their joint lives has sometimes been held to mean during the joint lives and the life or lives of the survivor or survivors.¹⁵ There is probably no one error in the use of language which the unprofessional are more likely to make. The expression "during their lives" is almost universally understood to extend to the termination of all the lives named. The term "joint lives" seems somewhat more definite to the common apprehension. But either form of expression in strictness only extends to the death of one of the number, when the "joint lives" or the "lives," as a whole, cease. And it must require something in the will, more than mere conjecture, to enable the court to continue the estate until all the lives cease.

10. A bequest to one, and if he dies without issue, then over, will give no estate to his issue by implication, although the probable intent is very obvious.¹⁶ But with the aid of other portions of the will such implication may arise.¹⁶ Where a bequest over is made upon an event which fails, the estate thereby becomes absolute.¹⁷ And if a bequest is made dependent upon an appointment which cannot be made during the life of the appointees, no estate vests.¹⁸

11. Where the testator gave his real and personal estate to his daughter for life with remainder to his other children, but directed that no division should be made until the decease of his daughter and her husband, and the survivor of them, it was held that the husband took no estate by implication.¹⁹ There is an important case

¹³ *Hudson v. Bryant*, 1 Coll. C. C. 681; *Ogle v. Corthorn*, 9 Jur. 325.

¹⁴ *Blackwell v. Bull*, 1 Keen, 176.

¹⁵ *Smith v. Oakes*, 14 Sim. 122; *Townley v. Bolton*, 1 My. & K. 148.

¹⁶ *Neighbour v. Thurlow*, 28 Beav. 33; *Kinsella v. Caffrey*, 11 Ir. Ch. 154; *Addison v. Busk*, 14 Beav. 459; *Lee v. Busk*, 2 DeG., M. & G. 810; *Holton v. White*, 3 Zab. 330; *Roe v. Summerset*, 5 Burr. 2608; *Doe v. Roach*, 5 M. & S. 482; *Dyer v. Dyer*, 1 Mer. 414; *Doughty v. Stillwell*, 1 Bradf. Sur. Rep. 300; *Cooper v. Pitcher*, 4 Hare, 485.

¹⁷ *Stevens v. Hale*, 2 Drew. & Sm. 22.

¹⁸ *Halfhead v. Sheppard*, 1 El. & El. 918.

¹⁹ *Barnet v. Barnet*, 29 Beav. 239.

in which the House of Lords have recently discussed the
 * 205 question * of estates tail, and cross-remainders by impli-
 cation, and held such implications to result from the lan-
 guage used.²⁰

12. Where the testatrix gave a life-estate in stock to a feme sole if she remained unmarried, but if she married, then over, it was held, on her death unmarried, that the estate in remainder took effect.²¹

13. Implications will arise often from elliptical forms of expression, which necessarily involve and imply something more, or from gifts which cannot be made effectual, or be obeyed, without the implication of something more.²²

14. Where an annuity for life was given the testator's widow, and a trustee appointed with power to sell a certain portion of the real estate of the testator, and with a direction to pay the widow \$1,000 beyond the annuity, in any one year, when he thought that necessary for the widow to maintain and educate the children, and support herself in a manner suitable to her estate and condition, it was held, that although there was no express devise of the real estate to the trustee, it must be applied, inasmuch as the personal estate was not sufficient to more than pay the debts, leaving the legacy and annuity to the widow, otherwise wholly unprovided for, and the devise or legacies to the children being made subject to the trust. The widow was accordingly allowed to maintain a bill in equity against the trustee for the recovery of her annuity.²³

15. An explicit and express bequest, in regard to which there can be no question or doubt, will always prevail over a provision in a subsequent codicil, which, standing alone, might seem to create a bequest by implication.²⁴

16. Although, where the testator unequivocally refers to a former provision in his will as having been made, the courts will so treat it, and uphold it as part of the testament, that will not be done upon mere conjecture or implication.²⁵ Devises and legacies by

²⁰ *Atkinson v. Holtby*, 10 Ho. Ld. Cas. 313; s. c. 9 Jur. N. s. 503. See also *Clark*, in re, 8 Law T. N. s. 571; *Dutton v. Crowdy*, 10 Jur. N. s. 28.

²¹ *Wardroper v. Cutfield*, 10 Jur. N. s. 194.

²² *Parker v. Tootal*, 11 Ho. Lds. Cas. 143.

²³ *Walker v. Whiting*, 23 Pick. 313.

²⁴ *Joiner v. Joiner*, 2 Jones, Eq. 68.

²⁵ *Hyatt v. Pugsley*, 23 Barb. 285. The intent must be very clear. *Post v. Ho ver*, 33 N. Y. 593.

implication depend upon intent. If one provision cannot be intelligibly explained, except upon the supposition that the testator * intended to make some other corresponding provision * 206 as to the same or other property, courts will imply such provision. One implication may be rebutted by another.²⁶

17. Under a direction to apply the interest of a fund to the support of the testator's married daughter, in case she should become a widow, and she died without becoming a widow, it was held to be an implied direction to accumulate the interest of the fund until the decease or widowhood of the testator's daughter; and in the event of her dying without becoming a widow, the fund with accumulations must go to the parties next entitled.²⁷

18. Power to invest may be implied from direction to pay interest.²⁸ An executrix may be held to be appointed by mere implication.²⁹ But a direction to continue a partnership is not to be implied, from giving an option whether or not the executor shall avail himself of a provision in the articles in his favor.³⁰

19. A devise to the wife, and if she dies leaving children, to the husband for life, and then to the children, but if there were no children, then, after the death of the husband and wife, to others, was held to create an estate in the husband, for life, by implication, he having survived the wife.³¹

20. Where A. devised a moiety of certain land to and between B., C., and D., and the heirs of their bodies respectively, and in default of such issue to any of them, to M., her heirs and assigns, it was held that "any" must be construed "all," and that cross-remainders were created between B., C., and D. by implication.³²

21. Where a legacy was directed by the testator to be held on

²⁶ *Rathbone v. Dyckman*, 3 Paige, 9.

²⁷ *Wood v. Cone*, 7 Paige, 471. And a bequest for maintenance, with the direction, that in case the legatee should lose any of the property first given, and need more, it should be added, was held not to justify the increase, unless some of the property first given were lost, even if the legatee required more for her comfortable support. *Ely v. Ely's Ex'rs*, 5 E. C. Green, 43.

²⁸ *Ackerman v. Emott*, 4 Barb. 626.

²⁹ *Bayeaux v. Bayeaux*, 8 Paige, 333.

³⁰ *Kinmonth v. Brigham*, 5 Allen, 270.

³¹ *Blake's Trust*, Law Rep. 3 Eq. 799; *Bradley v. Cartwright*, Law Rep. 2 C. P. 511.

³² *Powell v. Howells*, Law Rep. 3 Q. B. 654; *Hannaford v. Hannaford*, L. R. 7 Q. B. 116; *Ridge's Trust*, L. R. 7 Ch. App. 665.

trust for D., "should he survive my sister T.; should he not survive her, nor attain his twenty-first year," over to others named,—it was held that an absolute gift to D. at twenty-one must be implied; and that, after that event, the legatee in remainder could maintain no claim.³³

CHARGING LEGACIES AND DEBTS UPON REAL ESTATE.

1. The intent must be clear to charge debts or legacies on real estate.
2. Where the direction for payment of debts can fairly refer to personalty, it will be so construed.
3. Forms of expression various, and not important, except in cases very similar.
4. A charge on real estate does not vest until payable.
5. Legacies must abate, on deficiency of personalty, unless expressly or by fair implication charged on real estate.
6. This may be done, 1, by express words or clear intent gathered from the will, &c.; 2, where the testator directs legacies first paid, or devises lands for payment of legacies; 3, where the executor is devisee, and directed to pay legacies.
7. Such charge may be enforced, in equity, against purchasers.
8. Where real and personal estate both charged, the former merely subsidiary.
9. The executor wasting the personal estate will give the legatee no lien upon lands devised to him. But a charge once created must continue till removal, although dependent upon a remote contingency.
10. The claim of legatees upon lands charged, not barred by statute of limitations, or by receipt in full, without satisfaction.
- n. 20. Summary of cases upon different points.
11. The court will consider the nature and amount of the property and the circumstances of the testator, in determining whether legacies are to be charged on land.
12. Legacies may be charged exclusively upon real estate, and the personal duty of the devisees of the same.
13. Performance of condition creates no charge on estate conveyed.
14. How the lien for payment of legacies released.

§ 15. 1. THE importance of the question, whether the debts or legacies are or not charged upon the real estate or particular portions of it, is often very considerable. This will almost of necessity, like other matters resting in intent, depend upon the words used, with reference to the other provisions of the will, and the surrounding circumstances. It seems to be well settled that such

³³ Thomson's Trusts, in re, L. R. 11 Eq. 146.

a result is not to be brought about by any mere doubtful words or implications. The personal estate is the primary fund for the payment of debts, and also of legacies. And it has often been said that this primary course of administration is not to be changed without clear evidence of intention.¹ The expression * here used by Mr. Justice *Wilde*, a high authority, * 208 is that doubtful words in a will are not to effect the exemption of the testator's personal property from the payment of debts, and charging them on real estate.

2. And where the bequest was in this form, after devising the wife certain real estate, "also all my personal estate," &c., "after payment is made therefrom of my just debts, funeral charges, and other necessary expenses," and the remainder of the real estate was directed "to be divided as the law directs," it was held that the debts were not charged upon the real estate devised the wife, and, there being a deficiency of personalty for that purpose, that they must be paid out of the real estate undevised.²

3. The cases are very numerous where the terms used have been held sufficient to charge the payment of legacies upon real estate; but it would scarcely be useful to occupy time and space in repeating them here,³ as they would not govern other cases not entirely similar.

4. It seems entirely well settled that a mere charge on land, payable at a future day, does not vest until the time of payment, and if the legatee in the mean time decease the legacy will lapse, and the estate, if devised, will go to the devisee freed from the

¹ *Seaver v. Lewis*, 14 Mass. 83. See also *Davis v. Gardiner*, 2 P. Wms. 187; *Kightley v. Kightley*, 2 Ves. Jr. 328. If it can be gathered from the general intent of the will that the testator's purpose was to exonerate his personalty from the payment of debts and legacies, the court will give effect to it, and will not require express words. *Bugbee v. Sargent*, 27 Me. 338; *Ion v. Ashton*, 8 W. R. 573; s. c. 6 Jur. N. s. 879. See also *Portarlington v. Damer*, 10 Jur. N. s. 54; s. c. 12 W. R. 391.

² *Adams v. Brackett*, 5 Met. 280.

³ *Roberts v. Roberts*, 13 Sim. 336; *Ashby v. Ashby*, 1 Coll. C. C. 549; *Gittins v. Steele*, 1 Swanst. 24; *Williams v. Chitty*, 3 Vesey, 545; *Hartley v. Hurle*, 5 id. 540; *Austen v. Halsey*, 6 Ves. 475; *Cross v. Kennington*, 9 Beav. 150. The devise of leasehold estates or lands under lease for the payment of legacies will carry the rent accruing after the decease of the testator. *Getsandaffer v. Caylor*, 38 Md. 280.

charge. In other words, the lapse will enure for the benefit of the devisee.⁴

5. It seems to be the settled rule upon the subject, that legacies are always presumptively payable out of personalty; and if there proves to be a deficiency for the payment of debts and legacies the legacies must abate, unless they are charged upon the real estate. And it has been held that real estate is never charged with the payment of legacies unless the intention of the testator, so to charge it, is either expressly declared, or fairly and satisfactorily to be inferred from the language of the will.⁵ And the same * 209 rule * of construction is maintained, for substance, in a large number of the American cases.⁶

⁴ Phipps v. Lord Mulgrave, 3 Vesey, 613; Pearce v. Loman, id. 135; Pawlett v. Pawlett, 1 Vern. 321. But where the legacy is made a personal charge upon the devisee of, as well as upon, real estate, it will vest before the time of payment arrives. In other words, if the legacy is so given as to vest upon the death of the testator, and the payment merely deferred, it will not lapse, by the death of the legatee, before the time of payment. Hodgson v. Rawson, 1 Ves. Sen. 44; Jeal v. Titchener, 1 Br. C. C. 120, and note; s. c. nom. Jeale v. Titchener. Manning v. Herbert, Amb. 575.

⁵ Stevens v. Gregg, 10 Gill. & Johns. 143. This subject is considerably discussed in the recent English case, Allan v. Gott, L. R. 7 Ch. App. 439, and the earlier English cases extensively reviewed, with the conclusion, that, in order that legacies charged upon real estate may be payable out of the real and personal estate *pro rata*, it is not necessary that the testator should have directed an absolute conversion of the real estate. It is sufficient that he has shown an intention of creating a mixed fund of realty and personalty out of which the legacies are to be paid; consequently, where the testator had empowered his trustees to sell his real and personal estate in case and as often as they should think fit, and had directed them to pay certain legacies out of the residue of his real and personal estate, and the moneys arising from the sale thereof, it was held, from the construction of the whole will, that the legacies were payable *pro rata* out of the real and personal estate. See also Quimby v. Frost, 61 Me. 77. Where legacies are in the first instances clearly charged upon the corpus of real estate, that charge will not be cut down to the income of such estate upon any mere construction of subsequent words. Pearson v. Helliwell, L. R. 18 Eq. 411, citing Phillips v. Gutteridge, 3 DeG. & S. 332. See also In re Hodges's Trusts, L. R. 18 Eq. 419.

⁶ Cornish v. Willson, 6 Gill, 299; Wright's Appeal, 12 Penn. St. 256; Kirkpatrick v. Rogers, 7 Ired. Eq. 44; Canfield v. Bostwick, 21 Conn. 550; Tracy v. Tracy, 15 Barb. 503, where it is said the real estate is charged with the payment of legacies by being blended with the personal. Hassanclever v. Tucker, 2 Bin. 525.

6. The question is learnedly examined and the cases extensively discussed in a recent case⁷ in New York, and the following propositions maintained : —

(1.) The charge by the testator of legacies upon realty may be made either by express words or by reasonable and obvious implication.⁸

(2.) Where the testator directs his debts and legacies to be first paid, and then devises real estate, or where he devises the remainder of his estate, real and personal, after payment of debts and legacies, it will be held to charge the realty.⁹

(3.) So too where the devisee of real estate is appointed executor, and is expressly directed to pay debts and legacies, it will be held to create a charge upon the real estate for the payment of legacies.¹⁰ But it has been held that the mere fact of devising the real estate to the executor, wholly or in part, without any express direction to him to pay the legacies, or any condition that he shall pay them, will not be sufficient to charge them upon the real estate in his hands.¹¹ But in such cases, where the personalty is manifestly insufficient to meet the debts and legacies, and the real estate is given to the executor, very slight circumstances will be laid hold of by the courts to raise an implied or equitable charge upon the realty, as was held by Chancellor *Walworth*, in *Harris v. Fly*,⁸ and in other cases.¹²

7. It seems to be well settled that where lands are held by subsequent bona fide purchasers for value, but who are obliged to trace * title through a devise, whereby a charge is created * 210 upon the land for the payment of legacies, such purchasers will be constructively affected with notice of such charge, and equity

⁷ *Reynolds v. Reynolds*, 16 N. Y. 257; *Taylor v. Dodd*, 58 id. 335.

⁸ *Lupton v. Lupton*, 2 Johns. Ch. 614; *Harris v. Fly*, 7 Paige, 421; *Oke-son's Appeal*, 59 Penn. St. 99.

⁹ *Newman v. Johnson*, 1 Vern. 45; *Harris v. Ingledew*, 3 P. Wms. 91; *Trott v. Vernon*, 2 Vern. 708; *Kentish v. Kentish*, 3 Br. C. C. 257; *Tompkins v. Tompkins*, Prec. in Ch. 397; *Bench v. Biles*, 4 Madd. 187, L. P.; *Wood v. Sampson*, 25 Gratt. 845; *Grouch v. Davis*, 23 id. 62.

¹⁰ *Henvell v. Whitaker*, 3 Russ. 343; *Doe d. v. Pratt*, 6 Ad. & Ellis, 180; *Alcock v. Sparhawk*, 2 Vern. 228; *Dover v. Gregory*, 10 Sim. 393.

¹¹ *Stevens v. Gregg*, 10 Gill & J. 143. It would seem that this case did contain sufficient direction to the executor to pay the legacies, and that they should have been held a charge on the real estate in his hands.

¹² *Luckett v. White*, 10 Gill & J. 480.

will enforce it upon the land in their hands.¹³ But as between two, one having actual notice of the charge and the other not, the former should be first charged.¹⁴

8. Where real and personal estate are both charged with the payment of debts and legacies, the former is merely subsidiary to the latter, and cannot be resorted to in the first instance, or until that is exhausted.¹⁵

9. Legatees whose legacies fail of payment by reason of the executor wasting the personal estate have no claim upon the real estate devised to such executor.¹⁶ But in one case, where the will provided that if either of the testator's daughters should be distressed and come to want, and be unable to support themselves, she or they should be maintained in a decent and comfortable manner out of the profits of the whole of the real estate, it was held to create a bequest and charge upon the income, and through that upon the land, into whosoever hands it might have come at the time of the happening of the contingency referred to.¹⁷

10. Where lands are devised to trustees, and an express trust created for the payment of legacies, the claims of legatees will not be barred by the ordinary statute of limitation.¹⁸ But the lapse of

¹³ *Harris v. Fly*, supra; *Wallington v. Taylor*, Saxton, 314.

¹⁴ *Aston v. Galloway*, 3 Ired. Eq. 126.

¹⁵ *Blann v. Bell*, 5 DeG. & S. 658; *Quennell v. Turner*, 13 Beav. 240; *Whieldon v. Spode*, 15 id. 537.

¹⁶ *Wilkes v. Harper*, 1 N. Y. 586; s. c. 2 Barb. Ch. 338; *Sims v. Sims*, 2 Stock. 158. And where legacies are charged on real estate in default of personalty, and the executor wastes the personal estate, which would otherwise have been sufficient to pay all the legacies, the legatees cannot maintain a lien upon the real estate. *Richardson v. Morton*, L. R. 13 Eq. 123. We believe that, in this country, most testators have no clear apprehension of any distinction between a legacy and a debt as to becoming a charge upon all property belonging to the estate after the decease of the testator; and we think the fact that all debts are by law made a charge upon realty, as well as personalty, should induce the courts to adopt the same construction as to legacies upon the slightest indication of such an intent. *Lapham v. Clapp*, 10 R. I. 543. Where the testator disposed of his personalty by nuncupative will, leaving real estate sufficient to pay his debts, it was held it must be so applied in exoneration of the personalty. *McCullom v. Chiester*, 63 Ill. 477.

¹⁷ *Pickering v. Pickering*, 15 N. H. 281; s. p. *Clyde v. Simpson*, 4 Ohio, N. S. 445; *Copp v. Hersey*, 11 Foster, 317; *Baylor v. Dejarnette*, 13 Gratt. 152; *Dannelly v. Edelen*, 40 Md. 117.

¹⁸ *Watson v. Saul*, 1 Giff. 188.

twenty years was held to create a presumptive bar.¹⁹ And where the legatee took the executor's note for the amount of his legacy, and signed a receipt in full, but on bringing suit upon the note, and obtaining judgment, failed to realize the amount due, it was held she did not thereby lose her lien upon the real estate of the testator, charged with the payment of the legacy.²⁰

¹⁹ *Henderson v. Atkins*, 28 L. J. Ch. N. s. 913. See also *Gwynne v. Gell*, 20 L. T. N. s. 508.

²⁰ *Schanck v. Arrowsmith*, 1 Stockt. 314; *Terhune v. Colton*, 2 id. 21.

We have brought together a large number of cases, with a brief intimation of the questions decided, which we deemed might be useful to the profession; and as they bear upon different points discussed in this section, we place them at the end. *Moore v. Whittle*, 22 L. J. Ch. 207, that a devise after payment of testator's just debts is subject to that charge; *s. p. Gallimore v. Gill*, 2 Sm. & G. 158, and *Lord v. Wightwick*, 1 Drew. 576; *s. c. 4 DeG., M. & G. 803*; *Scales v. Collins*, 9 Hare, 656, that assets will be marshalled in favor of legatees who can resort only to one fund; *Field v. Peckett*, 29 Beav. 568, where the charge resulted from a direction that the real estate be considered as personal; *Maskell v. Farrington*, 8 Jur. N. s. 665; *s. c.*, affirmed on appeal, *id.* 1198, in which legacies provided to be a charge upon real and personal estate were held to be a charge upon real estate subsequently specifically devised; *Daunt v. Daunt*, 13 Ir. Ch. Rep. 175, in which the devise was expressly made subject to the charge, and it was held that the personalty was exonerated; *Howard v. Chaffer*, 9 L. T. N. s. 243, in which the real estate was devised in trust to provide for legacies, and in which the lien of subsequent mortgagees was postponed to that of the legatees; *s. c. 2 Drew. & Sm. 236*. Devise of residue, after provision for payment of debts and legacies, held subject to charge in *Peacock v. Peacock*, 11 Jur. N. s. 280. Priority of charges on devise arranged according to the order of mention by testator in *Smith v. Wyckoff*, 3 Sandf. Ch. 77. And see on same point *s. c. 11 Paige*, 49 *Hoover v. Hoover*, 5 Penn. St. 351. And see *Lockwood v. Stockholm*, 11 Paige, 87, as to how far the devisee of land charged with a legacy is personally liable; how far subsequent purchasers of the property are charged, *Dodge v. Manning*, 11 Paige, 334; *Mahar v. O'Hara*, 4 Gilm. 424; *Miltenberger v. Schlegel*, 7 Penn. St. 241; *Solliday v. Gruver*, 7 Penn. St. 452; *Bank of the United States v. Beverly*, 1 How. U. S. 134; *Bugbee v. Sargent*, 23 Maine, 269, in which it is held that a court of equity will subject the legal estate to payment of the legacy charged upon it; *Gridley v. Andrews*, 8 Conn. 1, in which a mere residuary devise was held insufficient to create a charge; *Hallett v. Hallett*, 2 Paige, 15, in which the lien of the legacies charged upon land devised is preferred to that of the creditors of the devisor; *Glen v. Fisher*, 6 Johns. Ch. 33, 36, in which the devisee of land charged with a legacy is held personally and absolutely responsible for its payment; *Quick v. Quick*, Saxton, 4, in which a devise of land, "subject to the following incumbrances," was held to create a charge; *Van Winkle v. Van Houten*, 2 Green, Ch. 172, in which

* 211 * 11. Where the real and personal estate are blended in a common fund, and the personalty is inadequate to pay the
 * 212 debts, and the * residuary devise is of all "not herein otherwise disposed of," the legacies will be charged on the real estate. In determining whether a legacy is to be charged on real estate, the court will take into account the nature and amount of the property, and the circumstances of the testator.²¹

12. The testator gave certain legacies, and among them one of \$200 to his daughter, by name, and in express terms made them all, particularly specifying the one of \$200 to his daughter, "a lien and charge upon the real estate hereinafter devised to my two sons; viz., one-half thereof on the share of the real estate devised to each son, and the said real estate is devised as aforesaid, subject to the payment of said legacies." He devised to his two sons considerable real estate, some jointly and some in severalty, and made them his residuary legatees of all his property, being "all the remainder of my real and personal estate and choses in action not hereinbefore devised." The court held, at General Term, that the personalty did not constitute a primary fund for the payment of the legacy to the testator's daughter, on the ground that it was specially charged upon the real estate, and the devisees of such real estate made responsible for the payment of the same, and that the personal estate was all disposed of by the will. It was further held that the sons of the testator, by accepting the devise of the real estate, assumed the burden of the conditions imposed upon the devisee, and thereby became personally bound to pay the legacy in

the evidence to show an intent to charge the land is discussed; *Paxson v. Potts*, 2 Green, Ch. 313, that the mere blending of real and personal estate in a residuary clause do not affect a charge; *Owing's Case*, 1 Bland, 290, and *Kemp v. M'Pherson*, 7 Harr. & J. 320, that equity will enforce the charge into whose-soever hands the estate goes; *Spence v. Robins*, 6 Gill & J. 507, that a devise, on the devisee paying a certain sum, created a charge; *Shobe v. Carr*, 3 Munf. 10, to same point; *Downman v. Rust*, 6 Rand. 587, decided on the apparent intention of the testator; *Clarke v. Buck*, 1 Leigh, 487; *Trent v. Trent*, Gilmer, 174; *Givins v. Givins*, 1 Murph. 192; *Bray v. Lamb*, 2 Dev. Eq. 372, in which cases charging seems to have been favored; *Cogdell v. Cogdell*, 3 Desaus. 346, that a provision for legacies to be "payable out of the sale of his estate" creates a charge; *Decker v. Decker*, 3 Ham. 157, in which the devise was "free from incumbrance, except as hereinafter mentioned."

²¹ *Dey v. Dey*, 4 C. E. Green, 137.

question; and accordingly this joint action in equity against both was held maintainable.²²

13. A bequest of a legacy upon condition the legatee release all claim to certain real estate, which the legatee does before the payment of the legacy, will create no lien upon the estate in the nature of a vendor's lien for the payment of the legacy.²³

14. Ordinarily the charge upon real estate for the payment of a legacy cannot be divested except by an actual payment or release, or else by the decree of a court of competent jurisdiction where all parties interested are represented.²⁴

²² *Larkin v. Mann*, 53 Barb. 267. There seems no ground to question any portion of the foregoing decision, so far as charging the real estate, and making the devisees of the same personally responsible for the payment of the legacies. What is said in reference to the exoneration of the personalty and leaving the legacies a sole charge upon the realty was probably not necessary to the decision of the case, and seems more questionable upon general principles. But *Cole v. Cole*, 53 Barb. 607, maintains the propositions of the text throughout.

²³ *Barker v. Barker*, L. R. 10 Eq. 438.

²⁴ *Grode v. Van Valen*, 25 N. J. Eq. 95.

* 213 * CHAPTER II.

THE NATURE AND CONSTRUCTION OF DEVISES AND LEGACIES
AND TRUSTS.

SECTION I.

DEVISES AND LEGACIES, AS VESTED OR CONTINGENT.

1. Estates under wills vest at the death of the testator, unless otherwise provided.
2. An estate to take effect in possession, after another, may vest at the same time with the other.
3. Estates to take effect after an estate tail, and the indefinite failure of issue, void.
- 3 a. The terms, "death without issue," explained.
4. If the estate over vests at the decease of the testator, it will not be avoided by remoteness of possession.
5. Contingent, as opposed to vested interest, implies doubt whether the estate over attaches.
6. If the contingency is sure to occur, the estate may be regarded as a vested one.
7. Courts adopt construction most favorable to vesting.
8. Devises during widowhood, or life, so construed as to carry intention into effect.
9. The true definition of such estate is for life, if the devisee remain sole.
10. Sir *W. Page Wood's* exposition of the rule.
11. But if it appear that the estate over was only to take effect upon marriage, that construction will be maintained.
12. The same construction applied to estates dependent upon bankruptcy or insolvency.
13. Estates carved out for the benefit of devisee in remainder, both vest.
14. The courts have been ingenious in construing remainders, as contemporaneous with determination of prior estate.
15. The same rule of construction prevails, where the estates are not for the same person.
16. Other cases where the limitation is liberally construed in favor of the one entitled in remainder. Comparison of cases.
17. Summary of the cases stated by Sir *W. Page Wood*, Vice-Chancellor.
18. Further illustrations of the subject.
19. The intervention of trustees will make no difference. Further restrictions upon vesting.
20. Where the devise limits the vesting, in terms, or there is an equivalent provision, it prevails.

21. A devise over may favor the vesting of the prior estate, or it may have a contrary effect.

* 22. The case of *Festing v. Allen* stated and commented upon. * 214

23. The important point is, whether the contingency is made part of the character of the devise.

24. The same distinction illustrated by other cases.

25. The case of *Stead v. Platt* stated, where the devise itself was in terms dependent upon the devisee's attaining a certain age.

26. The present inclination of the English courts in favor of vesting. Case stated.

27. The rule as laid down by Vice-Chancellor *Knight Bruce*. Equitable estate vests.

28. Vice-Chancellor *Stuart's* opinion in favor of immediate vesting.

29. Words of contingency, as applied to persons and things, should have same construction.

30. Inclination to hold all estates vested. Old refinements abandoned.

31. Where the intermediate income is given to the same donee, the estate vests.

n. 64. The cases upon this point stated.

32. The accumulation of interest will not defer the vesting. But some cases hold otherwise.

33. Sir *William Grant* construed all similar gifts in favor of vesting.

34. The devise of a residue is indicative of an intention to vest the interest presently.

35. Where a vested estate is clearly given, it will not be cut down by vague words of qualification.

36. If the estate over is given to all testator's children, it is favorable to vesting.

37. Postponement to accommodate the estates indicates an intention to vest.

38. The form of the gift is often held decisive of the question of vesting. Review of the cases showing this is not now favored.

39. The general rule, in regard to a devise over to a class, is that it is contingent, but the children of the first donee seem an exception.

40. Any provision in regard to a single member of the class will be applied to the whole.

41. Clear gift not affected by reference to other provisions, but doubtful one may be.

42. Gift to the individuals of a class, or all but certain exceptions, creates vested interest.

43. But if made to such children as reach a certain age, there is no room for construction.

44. Where a residue is given to a class, and consists of reversionary property, it vests at once.

45. The time of vesting is generally deferred to the time of payment.

46. But gift to all of a class, as or when they attain certain age, creates vested interest.

47. Real and personal estate in same bequest receive same construction in this respect.

48. The later English cases hold all bequests of residue vested, under given circumstances.

49. No rule will embrace all the English cases.

50. Three rules clearly settled : —

(1.) That the testator may direct as to vesting.

(2.) Will be held vested if it can fairly be done.

(3.) To render an estate contingent, clear language or necessary construction indispensable.

* 215 * 51. All estates devisable, or descendible, where there is any present interest, if contingent.

52. The rule illustrated by Vice-Chancellor *Wigram*, in *Leaming v. Sherratt*.

53. Distinction between referring to a class, and to the individuals comprising it.

54. The American cases are numerous, but follow the lead of the English cases.

55. The leading case in Massachusetts is *Furness v. Fox*. Courts favor vesting.

56. In New York, courts hold the estate vested unless clearly contingent.

57. The point which determines that fact is, whether time is of the substance of the gift.

58. Numerous cases stated in illustration of the principle.

59. The general rule, that legacies charged on land lapse by the death of legatee before the time of payment, not applicable to cases of postponement for benefit of estate.

60. But an estate in remainder which is clearly contingent will be so held, however inconvenient.

61. The law of Pennsylvania conforms to the above rules. Numerous cases stated.

62. The same is true in the State of New Hampshire. Late cases stated.

63. The rule in Virginia stated. Cases illustrating the rule.

64. The cases in Florida and Georgia follow the rules of the English law.

65. The rule seems to favor contingency in Alabama. But not in Tennessee and Delaware.

66. Estates in remainder, dependent upon the life-estate of the widow, take effect when she waives the provision of will.

67. Case stated illustrating the rule upon this subject in Tennessee.

68. The construction in Connecticut favors vested remainders.

69. Contingent interests in remainder, or of executory devise, transmissible in Ohio.

70. Time of vesting under appointment deferred till time of enjoyment.

71. Time of vesting made dependent upon future event does not attach till that occurs.

72. But where interest is directed to be paid to the legatee, or the estate farmed for his benefit, will be held vested.

73. Bequest to A., and in case of his death to B., means his death during testator's life; and if both survive the testator, A. will take absolutely.

§ 16. 1. ALL estates, under wills, in the absence of any provision to the contrary, are to take effect, or become vested, at the decease of the testator. And where the testamentary instrument contains words in regard to any estate created by it, limiting the period of enjoyment to some future time, after the decease of the testator, it may then become a question whether the vesting of the estate is thus intended to be delayed, or only the time for present enjoyment.¹

2. The mere fact that one estate under a will is provided to take

¹ 1 Jarman (ed. 1861), 758.

effect after the termination of an intervening one will not have the effect to prevent both estates becoming vested at the moment * of the decease of the testator, the one in possession, the other in prospect or remainder.² * 216

3. It seems to be conceded that the devise of an estate in remainder, after an estate tail, and the indefinite failure of issue,³ is void as attempting to create an estate too remote, it implying the failure or termination of lives not in being at the time the devise takes effect. But words of that general nature have often been held to import nothing more than the failure of issue in being at the death of the testator, and in such case the estate would not be too remote.⁴ And where the words have reference to the failure of the issue of the testator, they naturally have no application beyond those in being at the death of the testator; and such has been the usual construction. As where the testator devised the reversion of an estate, in case of "failure of issue of my body by my said wife," and it was held not to imply more than that, if no issue should exist at the death of the testator, or, if existing, should die without further issue, in both of which cases the vesting would not be held void for remoteness.⁵

² 1 Jarman, 758. The simplest form of such estates, vesting in succession at the same moment, is that of an estate in fee-simple, devised to one for life, and after his decease to the other in fee, which are denominated, the first, an estate for life in possession; the second, an estate in remainder in fee-simple expectant upon the determination of the prior life-estate. And an estate may vest in one subject to be divested in favor of his children. *Salisbury v. Petty*, 3 Hare, 86. See also *Mansfield v. Dugard*, 1 Eq. Cas. Ab. 195; *Falls v. McCulloch*, 1 Phillips, Eq. 140; *Edwards v. Gibbs*, 39 Miss. 166; *Hancock v. Titus*, id. 224; *Rail v. Dotson*, 14 Sm. & M. 176.

³ As to what constitutes too great remoteness, see post, § 34, pl. 71, n. 160. The expression "die without issue" was held in one case to mean "die without issue before the death of the testator." *Bowers v. Bowers*, 17 W. R. 1004; *Farthing v. Allen*, 2 Madd. 310, disapproved. But in another case the word "issue" was held equivalent to children, and "die without leaving issue" meant "die without having had issue," which seems to us more nearly to meet the probable intent of testators in the majority of cases than any other. *Bryden v. Willett*, L. R. 7 Eq. 472.

⁴ *Lytton v. Lytton*, 4 Br. C. C. 441.

⁵ *Egerton v. Jones*, 3 Sim. 409; *Wellington v. Wellington*, 1 Wm. Bl. 645. The last was a case of devise, on default of issue of his own body, being a bachelor, and it was held merely a conditional devise, and good, if the testator die without ever marrying. See also *Sanford v. Irby*, 3 B. & Ald. 654; *Doe v. Ewart*, 7 Ad. & Ell. 636; *Hall v. Chaffee*, 14 N. H. 215, 221-224; 1 Washb.

3 *a*. This subject came under revision before the new court of appeal, in *Olivant v. Wright*, (*a*) where the rule is thus stated : Where there is a gift over in the event of death without issue, the rule is that death without issue must be held to mean death without issue at any time, unless a contrary intention appears in the will, and the introduction of a previous life-estate does not alter the principle of construction. But in this case a contrary intention was held to be sufficiently expressed by a direction to distribute the remainder at the decease of the life-tenant, thus implying that death without issue meant death without issue during the life-estate, and that consequently all entitled in remainder, who survived that event, would take their share ; and where any had deceased before, leaving issue, the issue would then take the share of such, if so provided. (*b*)

* 217 * 4. If the remainder be a vested one, it matters not how long the enjoyment be deferred : it is only executory devises and contingent remainders which are rendered void for remoteness. And the rule does not always apply to contingent remainders the same as to executory devises. We do not propose to explain much in detail the doctrine of contingent remainders or executory devises. That would carry us quite beyond the limits of our present undertaking. Our main purpose here is to define what is intended, in the language of the law, by an estate being vested or contingent.

5. Chancellor *Kent* thus defines that distinction : ⁶ A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate. It is not the uncertainty of enjoyment in future, but the uncertainty of the right to that enjoyment, which marks the difference between a vested and contingent interest. The contingency on which the remainder is made to depend must be a common or near pos-

on Real Prop. 361; 4 *Kent*, Comm. 278. A remainder to vest upon the decease of persons in being at the decease of the testator, without leaving issue, is always valid of course, there being at most a postponement for life or lives in being. *Nicholson v. Bettle*, 57 Penn. St. 384.

(*a*) 24 W. R. 84, *O'Mahoney v. Burdett*, L. R. 7 Ho. Lds. 388, and *Ingram v. Soutten*, id. 408, are here distinguished; and *Olivant v. Wright*, L. R. 20 Eq 220, is reversed. Post, n. 98.

(*b*) Post, pl. 44, and n. 98.

⁶ 4 Comm. 206.

sibility, such as death, or death without issue or coverture. If it be founded on some remote possibility, such as the remainder to a corporation not then in existence, or to the heirs of one not then in being, which the law terms a possibility upon a possibility, it is void.⁷

6. From a careful examination of this subject, it will be found, we think, that the question of vesting, or remaining contingent, depends upon whether the condition of the intervening estate determining, and the estate over taking effect, is one that must happen some time, and so as to give effect at some period to the second estate, or may never happen. If the former, then the second estate in remainder will always be regarded as vested. But in every case where the *existence* of the secondary estate is made dependent upon a contingency which may never happen, or never happen so as to allow of the vesting of the secondary estate, then the devise or bequest must be regarded as contingent, as well in its character as in regard to the time when it will come into operation.

7. The courts have generally manifested a disposition to so construe the language of devises and legacies as to favor the vesting * of all the estates attempted to be created. Thus, * 218 where a devise is made to the first and other sons of A. successively, in tail, *and, in default of such sons*, to the daughters of A. in tail, then, although A. have sons, yet upon their dying without issue the devise to the daughters in remainder takes effect.⁸ And there are numerous cases where the remainder, upon the strict construction of the terms in which the intervening estate was expressed to take effect, might be regarded as contingent, yet the courts have construed the remainder as dependent upon the determination of the prior estate, in any mode, without reference to the precise form in which it was provided it should terminate, in order to have the remainder become effectual, and have thus treated the

⁷ *The Mayor of London v. Alford*, Cro. Car. 576; *Cholmley's Case*, 2 Co. Rep. 50 a. A vested interest may exist in a contingent remainder. *Dunn v. Sargent*, 101 Mass. 336; *Staples v. D'Wolf*, 8 R. I. 74. But see *Beatty v. Montgomery*, 21 N. J. Eq. 324; *Thomas v. Anderson*, id. 22. The want of a bequest over does not affect the contingent character of the bequest. *Gilliland v. Bredin*, 63 Penn. St. 393.

⁸ *Doe v. Dacre*, 1 B. & P. 250; s. c. 8 T. R. 112.

remainder as vesting from the decease of the testator.⁹ The courts have thus treated the provision in regard to the intervening estate, that, upon it being removed in any of the modes pointed out, the person entitled in remainder should come into possession, as equivalent to a provision that if it be removed in any way, though against the words and intent of the bequest, thus making the remainder vest immediately upon the removal of the intervening estate, even by lapse, and where the first taker died in the lifetime of the testator leaving issue, but who could not take.¹⁰ But it was held, where the intervening estate was made dependent upon the first devisee assuming a particular name, and also upon the continuance of an estate tail, and the first devisee survives the testator and assumes the required name, and then dies without issue, that the estate over will not take effect.¹¹

8. But devises to the widow of the testator, for life, if she shall so long continue a widow, and if she shall marry, then over, have been uniformly construed as if expressed to be devises during life and widowhood, and to be determinable either upon death or marriage. Many of the cases are expressed, in precise terms,
 * 219 that if * the widow shall marry again the estate over shall take effect, where there is no definite provision to that effect in the event of death.¹²

9. In one case¹³ Lord *Hale* likened such an estate to one during widowhood, but it is obvious the comparison is imperfect. The

⁹ *Goodright v. Jones*, 4 M. & Sel. 88; *Lewis v. Waters*, 6 East, 336. See also *Guyther v. Taylor*, 3 Ired. Eq. 323. See *Surtees v. Surtees*, L. R. 12 Eq. 400.

¹⁰ *Hutton v. Simpson*, 2 Vern. 722; *Hodgson v. Ambrose*, 1 Doug. 337. See also *Gotch v. Foster*, Law Rep. 5 Eq. 311.

¹¹ *Amhurst v. Darnelly*, 8 Vin. Ab. 221, pl. 21; s. c. 5 Br. P. C. Toml. 254. But this seems not, in principle, very consistent with the rule in *Avelyn v. Ward*, 1 Ves. Sen. 420; *Doe v. Scott*, 3 M. & Sel. 300, and other cases, where the lapsing of the intervening estate is held not to defeat the remainder over.

¹² *Luxford v. Cheeke*, 3 Lev. 125; *Gordon v. Adolphus*, 3 Br. P. C. Toml. 306; *Brown v. Cutter*, T. Raym. 427. In *Sheffield v. Orrery*, 3 Atk. 282, the strict construction was adhered to by Lord *Hardwicke*, who held the estate over to be a strict limitation, to take effect only in the event of the tenant for life marrying again. And a somewhat similar construction was adopted in *Pile v. Salter*, 5 Sim. 411, on account of the peculiarity of some of the provisions of the will.

¹³ *Lady Fry's Case*, 1 Vent. 199, 203. See *Jordan v. Holkham*, Amb. 209.

more perfect definition of the estate is "to continue during life, if the devisee shall so long continue sole and unmarried; but after the decease or marriage, then over."

10. But in a very recent case,¹⁴ the Vice-Chancellor, Sir *W. Page Wood*, said, that the class of cases, where it had been held that the estate over could only take effect upon the marriage of the devisee for life, had been decided upon their peculiar circumstances; but that in the class of cases like the one before him, where the devise over was made in terms dependent upon the tenant for life marrying again, the provision, by implication, was always to be extended so as to include the determination of such intervening estate, either by death or marriage, and consequently the gift over is to be regarded as a vested remainder.¹⁵

11. But if there is any thing in the form of the devise, or in the circumstances of the case, clearly indicating that the estate over was only intended to take effect in the event of marriage, that construction will prevail.¹⁶

12. And the same rule of construction which obtains in regard to devises during widowhood applies to those which are made to *depend upon the first devisee not becoming bankrupt * 220 or insolvent, and that upon the happening of such an event the devise over shall take effect. It seems that the true construction is, that upon the determination of the intervening estate, either by bankruptcy, insolvency, or death, the remainder will take effect.¹⁷

13. Where the intervening estate and the devise of the remainder in fee are for the benefit of the same persons, the first estate being given to trustees during infancy, coverture, or for

¹⁴ *Browne v. Hammond*, Johns. (Eng. Ch.) 210, 213.

¹⁵ Similar views have been adopted in some analogous cases, where the devise was not strictly of this class. As where the devise was to the executor in trust for E., for life; the executor being directed to pay her the rents every six months, "provided that if E. should marry," then over. E. died without ever having married, and it was held the estate over took effect. *Meeds v. Wood*, 19 Beav. 215. And in *Bainbridge v. Cream*, 16 Beav. 25, where, in a similar case, the remainder was expressly directed to be distributed among such persons as should be the survivors of a class at the death of the tenant for life or widowhood, and the estate was determined by marriage, it was held the distribution of the remainder must be made immediately.

¹⁶ 1 Jarman, 763.

¹⁷ *Etches v. Etches*, 3 Drew. 441. And such estates are contingent until the event occurs. *Allen v. Whitaker*, 34 Ga. 6.

some other special purpose, it has been held that the remainder will vest upon the decease of the testator, and the right become absolute upon the termination of the intervening estate by the death of the devisee during minority.¹⁸

14. It being an established rule that all remainders, so devised that they may not take effect at the determination of the particular estate upon which they depend, are to be regarded as void, the courts have manifested considerable ingenuity in placing such a construction upon the words of the devise as to allow of the remainder taking effect at the determination of such intervening estate, in whatever mode that shall occur. Thus, where the testator provided that his land should be held and managed by his executors until his younger son came of age, and then that it should go in fee to such son, his heirs, &c., and the son died at nine years of age, the court held that the estate took effect from the first, as a vested remainder, to come into possession upon the determination of the intervening estate.¹⁹ The doctrine of *Boraston's Case* seems to be adopted in many of the American states.²⁰

And a devise or bequest upon one arriving at a prescribed * 221 age, and * containing a provision that upon failure of coming to such age the same to go to others of the same class, does not create a vested interest until the legatee reach that age.²¹ But a devise over to the children of a person living creates a vested remainder in the children in esse, opening to let in those subsequently born; but such a bequest of personalty is contingent and joint, admitting of survivorship.²² And such a devise to the

¹⁸ *Grant's Case*, cited 10 Co. Rep. 50 a; *Phipps v. Ackers*, 9 Cl. & Fin. 583.

¹⁹ *Boraston's Case*, 3 Co. Rep. 19 a. And the same rule has been reaffirmed in numerous subsequent cases. *Bromfield v. Crowder*, 4 B. & P. 313; *Jackson v. Marjoribanks*, 12 Sim. 93; *Milroy v. Milroy*, 14 Sim. 48; *Parkin v. Knight*, 15 id. 83. The cases are very numerous where similar constructions have been adopted. See *Mansfield v. Dugard*, 1 Eq. Ca. Ab. 195, pl. 4; *Morris v. Underdown*, Willes, 293; *Hayward v. Whitby*, 1 Burr. 228; *Satterthwaite v. Satterthwaite*, 1 Wm. Bl. 519; *Wheeldon v. Lea*, 3 T. R. 41; *Wight v. Cundall*, 9 East, 400; *Edwards v. Symons*, 6 Taunt. 213; *Farmer v. Francis*, 2 Bing. 151; *Revell v. Parker*, 1 M. & Sel. 692; 1 *Jarman* (1861), 764, and note; *Doe v. Ewart*, 7 Ad. & Ell. 636.

²⁰ *Kerlin's Lessee v. Bull*, 1 Dall. 175; *Hodgson v. Gemmil*, 5 Rawle, 99, 104; *Wells v. Ritter*, 3 Whart. 208; *Cowdin v. Perry*, 11 Pick. 503, 508.

²¹ *Cowdin v. Perry*, 11 Pick. 503.

²² *Emerson v. Cutler*, 14 Pick. 108; *Nash v. Cutler*, 16 Pick. 491; *Dingley v. Dingley*, 5 Mass. 535; *Boone v. Dyke's Legatees*, 3 Mon. 529, 537.

testator's daughter C. for life, and after her death unto and among every such child and children as she shall have lawfully begotten at the time of her death, give a vested remainder to all the children of C. living at the date of the devise and the death of the testator, and the child of one who died during the life of the mother is entitled to the share of its parent.²³

15. But it is not regarded as important to the adoption of this construction, favoring the absolute vesting and possession of the remainder upon the determination of the prior estate, in any mode, that such prior estate should be for the benefit of the same person for whom the remainder is provided. The same course of construction has been adopted where the intermediate estate was for others.²⁴

16. The same principle of construction is applied to that class of cases where the remainder, in terms, seems to be made to depend upon the prior estate having taken effect, but which, in fact, does not occur in the particular cases.²⁵ And where a bequest is made in trust to pay the interest to the separate use of A., for life, and after her decease the capital to go to her children, and if no child, to her husband during his life; "and from and after his decease, *in case he shall become entitled to such interest*, then to pay the principal to others; it was held that although the husband never became entitled to the income, having deceased before his wife, that the devise over was good, the condition in regard to the husband taking being inserted, not as an express condition upon which alone * the estate over should take effect, but * 222 only as fixing the limit before which the estate over should not take effect, provided the estate should ever come to him. The language of Sir *William Grant*, M. R., is specially applicable to all similar cases. The words will bear that construction, and the reason of the thing seems to require it.²⁶ And the same learned

²³ Doe d. Barnes v. Provoost, 4 Johns. 61. Mr. Justice *Spencer* dissented from this decision, upon the ground that the children living at the death of the mother only were entitled to the remainder, and consequently it was contingent; which seems the more natural construction of the words used.

²⁴ 1 Jarman, 765.

²⁵ Webb v. Hearing, Cro. Jac. 415; Anon. 2 Vent. 363.

²⁶ Pearsall v. Simpson, 15 Vesey, 29. And where the testator devised all his estate, real and personal, to trustees for the benefit of his children during life, but, in case of the failure of such trust, to such of his two brothers as shall then be alive, and at his decease he had no child, nor was his wife enceinte, it was held the estate vested immediately upon his decease in his two brothers,

judge held a similar view in *Massey v. Hudson*.²⁷ But there are many cases²⁸ where a more strict construction has been held, and the estate over has been defeated by the happening of an event not in the mind of the testator at the time of making the provision. Thus, where bequests over were made dependent upon the following provision, "And if my son shall die leaving my wife, without leaving a widow or any child," and the son died without leaving a widow or child, but not "leaving the testator's wife," she having already deceased, it was held that the bequests over failed, the Master of the Rolls assigning a reason very common in the mouth of English judges, but very rare with Americans anywhere: "I am afraid I must decide against the legatee. I am perfectly satisfied as to the intention, but it is not sufficiently expressed to enable me to execute it." And subsequently he says, "Can I reject these words, 'leaving my wife'?" which the learned judge, at that time, seemed to regard as an argument altogether invincible; yet involving, perhaps, no greater obstacle, in the way of doing both himself and the case justice by deciding according to his acknowledged convictions of truth, than what he had before overcome in cases almost innumerable, but which has proved much more formidable in later English cases than in those of an earlier date. It is perhaps impossible for any one to pursue always the precise line of truth and propriety. But it may be safe to affirm, that where a judge can fairly say, that *from the words of the will*, as applied to the subject-matter, taking into consideration such surrounding circumstances as are admissible in aid of the construction, he is satisfied that it was the intention of the testator to give a legacy or devise to a particular person in a given event which has occurred, it is quite unnecessary for him to affect or to feel reserve

* 223 in regard to his right to do so. He * is then bound to do so by every principle of law and of reason, and his refusal to do so must be attributable to some unfortunate infirmity. But

who were then living, although one of them deceased in two months, and before it could be shown that the testator would not have a posthumous child. *Sidebottom v. Sidebottom*, Law R. 2 P. & D. 365.

²⁷ 2 Mer. 130. And the following cases tend to illustrate and confirm the same view: *Key v. Key*, 4 DeG., M. & G. 73; *Wright v. Wright*, 21 L. J. Ch. N. s. 775; *Walmsley v. Vaughan*, 1 DeG. & J. 114; *Tuer v. Turner*, 18 Beav. 185.

²⁸ *Holmes v. Cradock*, 3 Vesey, 317.

there are a large number of cases where the conviction of the intention of the testator comes, not from the *words* of the will, but from conjecture, or from extrinsic circumstances, not admissible in proof, where forwardness to act upon such mere surmise might justly characterize any one assuming to do so as rash at least, if not something more. The case last referred to, and that of *Scott v. Chamberlayne*,²⁹ may fairly illustrate the point. In the latter case, the testator bequeathed both real and personal estate to A., and, in case of his death under twenty-one without leaving issue, to B., and made a codicil confirming the will in every respect, except that A. shall not be entitled before twenty-five. A. died after twenty-one and before twenty-five, without leaving issue, and it was held that B. had no title.³⁰

17. The result of the cases upon this subject is very clearly and * satisfactorily summed up by Sir W. Page * 224

²⁹ 3 Vesey, 302.

³⁰ By comparing the cases of *Holmes v. Cradock*, 3 Vesey, 317, and *Scott v. Chamberlayne*, supra, both of which were decided by Sir R. P. Arden, afterwards Lord *Alvanley*, M. R., with the cases of *Pearsall v. Simpson*, 15 Vesey, 29, and *Massey v. Hudson*, 2 Mer. 130, upon similar questions, and under a very similar state of facts, both of which were decided by Sir *William Grant*, M. R., whose chief praise consisted in always attempting to do *justice according to law*, we shall obtain a tolerably clear view of the distinction between those eminent jurists and judges and another class who seem specially to glory in doing justice in spite of the law. Three classes will embrace most of the cases in the books. 1. Those where the aim seems to have been mainly to see that the law was maintained inviolate. 2. Those where the aim seems to have been to reach the justice of the case by a kind of blind intuition, without much comprehension of the processes by which it could be made consistent either with the principles or the decided cases of the law. 3. Those where the aim seems to have been to reach the absolute and perfect justice of the case, in all particulars, but without any infringement of the most approved rules and principles of law. And those judges who succeed in bringing the greatest number of cases into the last category must be pronounced, upon the whole, the most successful. And we have no purpose of placing Lord *Alvanley* in either of the two former categories, for he was, in the main, within the range of his own sphere of comprehension, a most excellent judge, and that is all which can be expected of any one. But we may be allowed to say, without any implied reflection upon any one, that there will be but one opinion in regard to placing Sir *William Grant* among the most eminent of modern equity judges. And we venture to affirm that it will be difficult to find a single case determined by him, where there occurred any serious departure from either precedent or principle, or where any marked injustice was suffered, which is certainly great praise to be earned by any one.

Wood, Vice-Chancellor, in a recent case: "The true way of testing limitations of that nature is this: Can the words, which in form import contingency, be read as equivalent to 'subject to the interests previously limited'? Take the simplest case: A limitation to A. for life, remainder to B. for life, and upon the decease of B., '*if A be dead*,' then to C. in fee. There the limitation to C. is apparently made contingent upon the event of A. dying in the lifetime of B. Nevertheless, inasmuch as the condition of A.'s death is an event essential to the determination of the interest previously limited to him, the court reads the devise as if it were to A. for life, remainder to B. for life, and, on B.'s death, *subject to A.'s life-interest*, '*if any*,' to C. in fee. That is an intelligible principle of construction; but, in order to its application, the condition upon which the limitation over is made dependent must involve no incident but what is essential to the determination of the interests previously limited. For instance, if the limitation be to A. for life, remainder to B. for life, 'and if, at the death of B., A. shall have died under the age of twenty-one,' or, 'and if, at the death of B., A. shall have died without leaving children,' then to C. in fee, — here, in either case, room is left for contingency. The condition of A.'s dying in the first case under twenty-one, and in the second without leaving children, is an event which may or may not have happened, when the life-estates in A. and B. are determined; and until it has happened, the limitation over is contingent, not merely in appearance, but actually. To these cases, therefore, the principle of construction referred to would obviously not apply."⁸¹

18. Where, therefore, the devise is to a person, when or if he shall live to attain a certain age, or at a certain age, this standing alone would be contingent; yet if it be followed by a limitation over, if he shall die before a certain age, this is regarded as explanatory of the nature of the estate which it was intended the devisee should take upon arriving at the age named; i. e., that it should then become absolute and indefeasible: the interest, therefore, in such cases, is held to vest upon the decease of the testator. And a devise over always supplies an argument in favor of the prior devisee or devisees taking a vested interest.⁸² Where * 225 the devise over is made dependent * upon the first devisee

⁸¹ *Maddison v. Chapman*, 4 K. & J. 709, 719.

⁸² *Smither v. Willock*, 9 Vesey, 233; *Peyton v. Bury*, 2 P. Wms. 626; *Murkin v. Phillipson*, 3 My. & K. 257.

dying before he come of age, or without issue, or any similar event, it is considered that the devise is equivalent to a provision that the first donee shall take an immediate vested interest, liable to be defeated by the happening of the contingency named; or if it do not happen, the estate then to become absolute and indefeasible.³³ And it seems to make no difference whether there is any provision for the first devisee to take an immediate benefit from the use or not.³⁴ And there will be no difference in this respect, whether the devise in the first instance be to an individual or to a class.³⁵ And it seems to be immaterial, in this respect, whether the estate over is given upon the first devisee not coming of age, dying without issue, &c., or whether some other fact be coupled with that, as his brother A. surviving him.³⁶

19. And the same rules of construction in this respect apply, whether the conveyance is direct or through the intervention of trustees.³⁷ The case of *Phipps v. Williams*³⁸ is an important and somewhat leading case upon two questions intimately connected with this subject, and very nearly related to each other, in regard to both of which the Vice-Chancellor here expresses a very clear opinion. 1. That the devise of the legal estate vesting the inheritance in trustees, who are required to convey the estate according to the directions of the will, can make no possible difference from one where the interest is provided by the will to take effect directly, without the intervention of trustees. 2. That if the intermediate devisee is required to do some positive act, besides what is merely accidental, and not under his control, in order to the conveyance of the estate by the trustees to him, then it cannot be regarded as a vested estate until after the happening of the event and compliance with the other requirements named in the will, which in this case was giving security for the punctual payment of annuities charged upon the estate.

20. But where the testator provides that the intermediate devisees shall not take vested estates until arriving at certain ages,

³³ *Edwards v. Hammond*, 3 Lev. 132; s. c. nom. *Stocker v. Edwards*, 2 Show. 398.

³⁴ *Doe d. Hunt v. Moore*, 14 East, 601.

³⁵ *Doe d. Roake v. Nowell*, 1 M. & Sel. 327.

³⁶ *Bromfield v. Crowder*, 4 B. & P. 313.

³⁷ 1 Jarman, 770.

³⁸ 5 Sim. 44; s. c. nom. *Phipps v. Ackers*, 9 Cl. & Fin. 583.

or the happening of other events, it must be so construed,
 * 226 * notwithstanding the words would otherwise be regarded as creating a vested interest.³⁹ In *Bland v. Williams*,⁴⁰ Sir *John Leach*, M. R., said: "Whether in a gift of this nature the time of vesting is postponed, or only the time of payment, depends altogether upon the whole context of the will." And in this case it was held that a devise to trustees, with direction to apply so much of the income as might be necessary for the maintenance and education of the children of the testator's daughters until they should respectively attain the age of twenty-four, and then to divide the principal equally among them, with a gift over in case any of them should die under twenty-four, without leaving issue, created a present vested interest, with an executory bequest over in the event named. It was decided by Sir *William Grant*, M. R.,⁴¹ that where there is no gift except by a direction to transfer an estate "from and after" a given event, the vesting must be postponed until after that event has happened, unless from particular circumstances a contrary intention is to be collected.⁴² And where the testator provides that the devisees shall take a vested interest, upon the happening of a certain event, this is regarded as raising a sufficient implication against their taking a present vested interest.⁴³

³⁹ *Russel v. Buchanan*, 7 Sim. 628.

⁴⁰ 3 My. & K. 411.

⁴¹ *Leake v. Robinson*, 2 Mer. 363.

⁴² But in this case there were positive obstacles in the way of regarding the estate as vested at an earlier date, inasmuch as the children attaining the age of twenty-five, the event named, were to take the whole, there being no provision for the issue of such children as died before that age.

⁴³ *Glanvill v. Glanvill*, 2 Mer. 38; *Comport v. Austen*, 12 Sim. 218, 246; *Wakefield v. Dyott*, 4 Jur. N. S. 1098. A question has sometimes arisen, whether, when the vesting of a bequest is directed to take effect only upon the happening of a certain event, the word "vest" is used in its strict legal sense, or only in the popular sense, as equivalent to "be paid," or become "indefeasible." If the testator has in other parts of the will treated the fund as belonging to the legatee, and spoken of his *share* of it before the period named for its vesting, it may be regarded that vesting is referred to in the sense of payable or becoming indefeasible. *Berkeley v. Swinburne*, 16 Sim. 275; *Poole v. Bott*, 11 Hare, 33; *Walker v. Simpson*, 1 Kay & J. 713. And where the testator has given over the fund in case the legatee die before the time named, without issue, or in any other special circumstances, thus indicating a purpose that if he die before that period in any other circumstances, it is still to be treated as his, the word "vest" must be understood in some secondary sense. *Taylor v. Frobisher*, 5 DeG. & S. 191. Lord *Hardwicke* seems to use the word "vest"

* 21. It seems not to be regarded as decisive whether * 227 there be a devise over or not, although some of the cases intimate an opinion that this is a circumstance in favor of the construction of an immediate vested interest. But in *Snow v. Poulden*,⁴⁴ Lord *Langdale*, M. R., held that this circumstance formed no obstacle to an immediate vesting of the estate. But where the person is not in esse, at the decease of the testator, upon whom the estate is devolved upon certain terms, there can be no immediate vesting.⁴⁵ The English judges and text-writers,⁴⁶ as before stated, seem to regard the fact of an estate over being given, upon the event named, as favoring the conclusion that the first estate was intended to vest immediately. There is no doubt such devise over often contains words and provisions the better enabling the court to determine the intention of the testator in regard to the vesting of the estate in the former donee. But in the absence of all such accidental aid, resulting from the form of the devise over, it has always seemed to us that the fact that the testator made no devise over, especially in the case of the first provision being for children, was a circumstance of very considerable weight in favor of the first estate vesting immediately, and treating the after-provision, in regard to coming into possession of the same at some future period, as having reference solely to a delay of the full possession and enjoyment of the same. The fact that the testator makes no provision in regard to the disposition of the estate, provided the event named for the devisee coming into full possession never occurs, shows very satisfactorily that it was not in the mind of the testator to create a contingent estate, since the very fact of doing so would suggest the propriety of some provision for the disposition of the estate, in the event of that con-

in this secondary sense in *Haughton v. Harrison*, 2 Atk. 329. See also *In re Blakemore's Settlement*, 20 Beav. 214; *In re Morse's Settlement*, 21 id. 174; *Rowland v. Tawney*, 26 id. 67. See *Greenhalgh v. Bates*, L. R. 2 P. & D. 47.

⁴⁴ 1 Keene, 186.

⁴⁵ *Duffield v. Elwes*, 2 Sim. & Stu. 544. This was a devise to the son of the testator's daughter, who should first take the name of Elwes, Mrs. Duffield, the daughter, having no son at the death of the testator. The Master of the Rolls, Sir *John Leach*, held that her eldest son took a vested interest; but this decision was reversed in the House of Lords. *Duffield v. Duffield*, 3 Bligh, N. S. 260.

⁴⁶ 1 *Jarman*, 773, and cases cited.

tingency not happening, as no one making a will would purposely leave property undisposed of.⁴⁷

* 228 * 22. But in *Festing v. Allen*,⁴⁸ where the Court of Exchequer gave an opinion upon a case sent for that purpose from the Court of Chancery, by Sir *J. Wigram*, V. C., it was decided that the devise of real estate to the testator's daughter, and after her death to such of her children as should attain the age of twenty-one years, created only a contingent remainder in the children; and they, all being under the age of twenty-one years at the decease of the daughter, could not take immediately, and consequently the estate in remainder was defeated, not only as to such children, but as to all others having contingent remainders dependent upon the determination of their estate. Baron *Rolfe* said, "The gift is not to the children of Mrs. Festing, but to the children who shall attain twenty-one; and no one who has not attained the age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing." But this case has been seriously questioned.⁴⁹

23. But the rule is stated with clearness by Vice-Chancellor *Wigram*,⁵⁰ thus: "There are two classes of cases, under one or the other of which the present case must fall." The one "is where the devise is to a party at a given age, and the property is given

⁴⁷ This question of the effect of the devise over showing a purpose in the testator not to divest the estate until after the failure of the first devisee to comply with the conditions or terms attached to his estate, will be found to have been discussed to some extent in the following cases: *Bland v. Williams*, 3 My. & K. 411; *Davies v. Fisher*, 5 Beav. 201; *Bree v. Perfect*, 1 Coll. C. C. 128. See also *Harrison v. Grimwood*, 12 Beav. 192. But in *Vawdry v. Geddes*, 1 Russ. & My. 203, Sir *John Leach*, M. R., does not seem to place much stress upon a gift over; and where the interest in the estate is given in the interim, it is here admitted the effect of that circumstance in favor of an immediate vesting is entirely removed, by a gift over in the event of the first devisee dying before a particular period. See also *Mackell v. Winter*, 3 Vesey, 236; *Barker v. Lea*, Turn. & Russ. 413.

The precise form of the argument in favor of vesting to be deduced from a gift over is, that, the gift over being made to depend upon particular events named, the presumption is that in every other event the estate was intended to remain in the first taker. But this form of the argument seems to us to be increased, where no estate over is given; for in that case it may well be said, the testator intended the estate to vest absolutely in the last donee named.

⁴⁸ 12 M. & W. 279; s. c. 5 Hare, 573.

⁴⁹ Post, pl. 29 and note.

⁵⁰ *Bull v. Pritchard*, 5 Hare, 567.

over if the devisee dies under that age. The other is where the description of the devisee is such as to make the given age part of that description. In cases of the former class the court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has * given to the devisee over; and, in order to give effect * 229 to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over. *Phipps v. Ackers*.⁵¹ In the second class the court has held the devise contingent, upon the ground that no one could claim who could not predicate of himself that he was of the age required; that otherwise he did not answer the entire description. *Festing v. Allen*.⁴⁸ The learned judge said it was not material to discuss whether greater violence to the probable intention of the testator was done in the one class or the other. It was certain the two classes of cases were, in principle, widely different from each other.

24. The same distinction is made by Vice-Chancellor *Shadwell*, in the case of *Newman v. Newman*.⁵² There was in *Boraston's Case*,⁵³ said the learned judge, and in the other cases of the same class, first a gift to the party intended to take, and then followed the words, "at, if, or when" the party shall attain a particular age, and it was held that these words were used merely to point out the time when the devisee was to take in possession. But in the present case there is no gift, except to such of the testator's grandchildren as shall sustain the character of attaining the age of twenty-four. The attaining that age is part of the requisite characteristic of the original taker.⁵⁴

⁵¹ 9 Cl. & Fin. 583; *Finch v. Lane*, L. R. 10 Eq. 501.

⁵² 10 Sim. 51.

⁵³ 3 Co. Rep. 19 a.

⁵⁴ This same distinction is taken with more or less distinctness in a considerable number of other cases. *Duffield v. Duffield*, 3 Bligh, N. S. 260; S. C. 1 D. & Cl. 268, 314. See also *Wills v. Wills*, 1 Dr. & War. 439; *Perceval v. Perceval*, L. R. 9 Eq. 386.

In *Watson v. Hayes*, 5 My. & Cr. 125, the distinction is recognized as well established, that even in the class of cases where the gift itself seems, in terms, to be made contingent upon the donee arriving at a certain age, if the entire income of the fund be secured to the donee in the mean time, this will be regarded a circumstance sufficiently controlling to fix it with the character of a vested devise.

25. But in the recent case of *Stead v. Platt*,⁵⁵ where the devise was in trust for the maintenance, education, and bringing up of the testator's four children, until they should severally attain the age of twenty-five years, at which time, and as they should severally attain that age, the testator devised and bequeathed "unto such of his said children as should attain that age, each one-fourth * of the whole estate in fee, with a gift over to the survivor or survivors, if any of his children should die without issue, either before or after attaining that age, it was held that nothing vested in any child dying before attaining the age of twenty-five.

26. It must be confessed that the more recent English cases manifest a decided inclination to disregard these mere formal distinctions in regard to the particular phraseology adopted by the testator, in defining the period at which his estates should vest absolutely in possession in the devisee, and to treat all such cases as creating an equitable vested estate, in the first donee, from the death of the testator; and to regard the delay as to full possession and enjoyment as merely the postponement of the exclusive control of the use by the devisee. Thus in *Doe d. Bills v. Hopkinson*,⁵⁶ although the court profess to go upon the particular

⁵⁵ 18 Beav. 50; s. p. *Merry v. Merry*, 17 W. R. 985; *Merry v. Hill*, L. R. 8 Eq. 619.

⁵⁶ 5 Q. B. 223. A bequest to the widow of the residue of the estate for her life, to be expended in the maintenance of herself and her children, and after her decease unto and among the children of the testator, to be paid to them as they shall severally attain the age of twenty-one years, with benefit of survivorship, gives a vested interest to each child upon attaining that age, and the survivorship has reference to that age. But those who attain twenty-one cannot demand their shares without indemnifying the mother against any deficiency as to the maintenance of herself and the remaining children under age. *Berry v. Bryant*, 8 Jur. N. S. 69; s. c. 2 Drew. & Sm. 1.

In the recent case of *Richardson v. Robertson* (6 L. Times, N. S. 75), in the House of Lords, the question, as to what period survivorship is to be reckoned, was much discussed in a case where the testator gave a life-estate in his funds, the principal at the expiration of the life-estate to be divided among several, and if any die, then among the survivors, without specifying the time of survivorship, and it was held that it must be referred to the time of distribution at the expiration of the life-estate, unless there was something in the will pointing to a different period; and that it being in the will referred to the time of the estate vesting could make no difference; that the word "vest" means *prima facie* "come into possession," and not "accrue in point of interest." We doubt if this is the common understanding of the word "vest." But where the dis-

phraseology of the instrument, it is apparent that the case might have been ruled in favor of the contingent quality of the devise, had it * not been for the obvious disappointment of * 231 the general purposes of the testator consequent upon such a course, which induced the court to hold that the estate vested immediately in the first donees, subject to be divested upon the failure of lawful issue.

27. In the recent case of *Riley v. Garnett*,⁵⁷ where the devise was to trustees to pay the income to a married woman during life, and after her death in trust for all her children who should attain the age of twenty-one years, or being daughters should marry, their heirs and assigns for ever as tenants in common, it was held to give vested estates to all the children as they came into existence, subject to be divested upon their dying under twenty-one, and, if daughters, unmarried. The Vice-Chancellor, *Knight Bruce*, said, "I am also of opinion, that according to the true construction of the will, upon the authorities preceding and including *Doe v. Nowell*,⁵⁸ there is an immediate equitable devise to all the children, . . . subject to the contingency of their estates being divested upon their death in minority."

28. And in a still more recent case this subject is extensively

tribution of an estate is deferred until those entitled to the estate over attain the age of twenty-one, with right of survivorship, no estate vests until that time; and it must be accumulated, in the mean time, after the termination of the life-estate. *Bull v. Jones*, 31 Law J. Ch. 858. But where the income is directed to be applied to the maintenance of the legatees before the period of distribution, that will be construed as a vesting of the estate from the time of such application, or the termination of the prior estate, if any. *Bell v. Cade*, 31 Law J. Ch. 383. See *Corneck v. Wadman*, L. R. 7 Eq. 80. An important case, *Manice v. Manice*, 43 N. Y. 303, holds that where shares of real and personal estate were devised to the testator's children, to be ascertained by a division or sale, the interest becomes vested from the decease of the testator, and takes effect in actual enjoyment as soon as the time appointed for such division or sale arrives; and that limitations over in case of the decease of any devisee before division take effect from the time appointed for sale or division, unless a contrary intent is clearly expressed. See, upon the general question, *Provenchere's Appeal*, 67 Penn. St. 463.

⁵⁷ 3 DeG. & Sm. 629.

⁵⁸ 1 Mau. & Sel. 327. But see *Eddel's Trusts*, L. R. 11 Eq. 559; *Countess of Bective v. Hodgson*, 1 H. & M. 376; 10 H. L. C. 656; *Holmes v. Prescott*, 12 W. R. 636.

considered and the cases examined with great care and thoroughness by Vice-Chancellor *Stuart*,⁵⁹ and many of the former arguments and refinements in favor of contingency were here rejected. In this case the devise was to trustees for the use of A. for life, remainder to all and every of his child or children who shall attain twenty-one, as tenants in common in fee, with an intermediate limitation, and then over. It was held that upon the death of A. leaving one child, an infant, such child took a vested estate in fee-simple, liable to be divested upon his dying under twenty-one.

29. It was also here held that words of contingency have no more invincible control, when applied to the description of a person, than when applied to the description of an event, and that the case of *Festing v. Allen*⁴⁸ was irreconcilable with the decision of the House of Lords in *Randall v. Doe* and other cases.⁶⁰

* 232 And in * the case of *Ex parte Styan*,⁶¹ Vice-Chancellor *Wood* favors the same construction, saying, "It is a question of serious difficulty, whether any substantial distinction can be made between a gift to a class of children, if they shall attain twenty-one, and a gift to all who shall attain twenty-one."

30. There can be no question that the tendency of the more recent decisions is clearly in favor of holding an estate in remainder vested where that can fairly be done, without too great violence to the language used. It was at one time doubted whether a devise, after the payment of debts charged upon the land, was not a con-

⁵⁹ *Browne v. Browne*, 3 Sm. & Gif. 568.

⁶⁰ The case of *Festing v. Allen* is discussed, ante, pl. 22, n. 48. And *Randall v. Doe* is found in 5 Dow, 202, where it was held by the House of Lords that a devise to the children of the testator's nephew as tenants in common in fee, but if such nephew should die without issue, or such issue should die under twenty-one, then over, all the children of such nephew living at his decease, although not of full age, took vested interests, liable to be divested by their decease before twenty-one. This seems to be the rule of law firmly established by the more recent and authoritative decisions of the English courts, notwithstanding the editors of the last English edition of *Jarman* seem to adhere to the rule laid down in *Festing v. Allen*,⁴⁸ and that class of cases. There can be no doubt the present inclination of the English courts will meet with more acceptance in the American states than the cases thus defended by Mr. *Jarman's* very able and learned editors, for the reason that they are more in conformity with the general intent of the testators, and less influenced by strict adherence to technical constructions. Ante, § 3, n. 42.

⁶¹ *Johns*. (Eng. Ch.) 387.

tingent estate until after the payment of the debts; but it is now clearly settled otherwise.⁶²

31. There are some special considerations which have been held to affect the question of vesting, which may properly be referred to here. Thus where the will provides for the donee, who is to take the estate in possession at a certain age, to enjoy the income of it during the intervening period, it is generally regarded as satisfactory proof that the testator intended the devisees to take a vested interest in the first instance. Sir *John Leach*, M. R., said, in *Vawdry v. Geddes*,⁶³ "Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property; but that presumption fails entirely when the testator has expressly declared that the legacy is to go over in case of the death of the legatee before a particular period." And Mr. Jarman says,⁶⁴ "A gift of interest, * eo nomine, obviously is difficult to be reconciled * 233 with the suspension of the vesting, because interest is a premium or compensation for the forbearance of principal, to which it supposes a title, but a mere allowance for maintenance out of, and of less amount than, the interest, has, it seems, no such influence on

⁶² *Carter v. Barnadiston*, 1 P. Wms. 505, 509; s. c. 3 Br. P. C. Toml. 64; *Bagshaw v. Spencer*, 1 Ves. Sen. 142; ante, § 3, n. 42.

⁶³ 1 Russ. & My. 203.

⁶⁴ 1 Jarman, 802 (ed. 1861). This subject is discussed in numerous cases, which it will scarcely be necessary to review here in detail. The result of all the cases seems to be, that where the specific interest or income of the estate is given to the donee, in the mean time, it affords the most satisfactory evidence that the testator intended to give the corpus of the estate, but only deferred the time of coming into possession, since the income would scarcely be given to the donee unless the title of the whole were regarded as virtually in him. And where a portion of the interest only is given, or for a portion of the time, or a sum sufficient for the support and education of the donee, in the discretion of the trustees, it affords a less conclusive ground of inference in favor of the estate vesting, but still one of very considerable weight. The cases are *Cave v. Cave*, 2 Vern. 508; *Stapleton v. Cheele*, 2 Vern. 673; s. c. in Prec. in Chancery, 318; *Fonereau v. Fonereau*, 3 Atk. 645; *Collins v. Metcalfe*, 1 Vern. 462; *Van v. Clark*, 1 Atk. 510; *Neale v. Willis*, 3 Barn. 43; *Hubert v. Parsons*, 2 Ves. Sen. 261; *Green v. Pigot*, 1 Br. C. C. 103; *Hoath v. Hoath*, 2 Br. C. C. 3; *Walcott v. Hall*, 2 Br. C. C. 305; *Dodson v. Hay*, 3 Br. C. C. 404; *Pulsford v. Hunter*, 3 Br. C. C. 416; *Roberts' Appeal*, 59 Penn. St. 70; *Fox v. Fox*, L. R. 19 Eq. 286.

the construction." But it seems to be conceded, that, if the entire interest is made applicable to maintenance, the argument in favor of vesting remains in full force.⁶⁴

32. So a direction to accumulate the interest by adding it to the principal until the donee shall attain twenty-one will not defer the vesting.⁶⁵ But it seems that where only a portion of the interest or income of the fund is directed to be expended in the maintenance of the legatee, and the remainder to be accumulated as part of the principal, until the donee shall attain his majority, and then the whole fund to be paid to the legatee or some other person, it will not, it has been held, create a present vested interest in the corpus of the fund.⁶⁶

33. Sir *William Grant*⁶⁷ states that the rule in *Boraston's Case*,⁶⁸ * and in *Mansfield v. Dugard*,⁶⁹ and in *Doe d.*

Wheeldon v. Lea,⁷⁰ applies strictly to pecuniary legacies, and that there is no reason to say that it requires any modification as applied to personalty, since the circumstances showed that "when" was used, not as a condition, but merely to postpone the enjoyment, the possession in the mean time being disposed of in another way. The word "when" by itself imports the same as "if," and they have always been held by themselves alone to import condition.⁷¹ But they are susceptible of explanation, as meaning nothing more than that the legacy is payable *at* a certain age, instead of *if* the legatee shall arrive at such age. And the learned judge here adverts to the distinction which was attempted by the civil-law writers between giving a legacy at twenty-one, and a legacy payable at twenty-one, as having been held by some equity judges as

⁶⁵ *Stretch v. Watkins*, 1 Madd. 253. See also *Blease v. Burgh*, 2 Beav. 221; *Josselyn v. Josselyn*, 9 Sim. 63; *Bull v. Johns*, Tam. 513; *Oppenheim v. Henry*, 10 Hare, 441.

⁶⁶ *Leake v. Robinson*, 2 Mer. 363; *Vawdry v. Geddes*, 1 Russ. & My. 203; *Scott v. Tyler*, 2 Br. C. C. 431. But the mere fact of a direction to accumulate the income till the legatee arrive at twenty-five years, and then to transfer the fund with its accumulations absolutely to the legatee, is by no means conclusive against the interest vesting before that period. *Saunders v. Vautier*, Cr. & Ph. 240. See also *Oddie v. Brown*, 4 DeG. & J. 179, 185, 194; *Lister v. Bradley*, 1 Hare, 10; *Greet v. Greet*, 5 Beav. 123.

⁶⁷ *Hanson v. Graham*, 6 Vesey, 239, 247; *Blamire v. Geldart*, 16 Vesey, 314; *Laxton v. Eedle*, 19 Beav. 321, contra.

⁶⁸ 3 Co. R. 19 a.

⁶⁹ 1 Eq. Cas. Ab. 195, pl. 4.

⁷⁰ 3 T. R. 41.

⁷¹ *Stapleton v. Cheales*, Prec. in Ch. 318; s. c. 2 Vern. 673.

too refined, and by others as altogether without foundation.⁷² And in another case, before the same learned judge, it was held that a bequest to A., for his second daughter that he shall have born, for her education till she shall arrive at the age of twenty-one, and after that to her and her heirs for ever, vested in such second daughter, though she died before attaining twenty-one, being an exception out of the generality of the bequest to her, and the time not being of the substance of the bequest.⁷³

34. It is often regarded as a circumstance of considerable weight in determining whether an estate was intended to vest presently, and only the enjoyment be deferred, or the estate itself was made dependent upon the happening of some future event, thus rendering it contingent in its nature, that the bequest consisted of the residue of the testator's property.⁷⁴ Thus in the case last cited, * although the terms of the bequest were quite sus- * 235 ceptible of being considered contingent, it was held that where the whole property is devised, with a particular interest given out of it, it operates by way of exception out of the absolute property, and that the particular interest given in the mean time did not create a condition precedent, but operated as a description of the time when possession is to be taken. This rule is founded upon the presumption that every man who sits down deliberately to make his will does not intend to leave any portion of his property in such a condition as not to pass under the will. The idea of any one deliberately purposing to die testate as to a portion of his estate, and intestate as to another portion, is so unusual, in the history of testamentary dispositions, as to justify almost any construction to escape from it. And the holding a residue undisposed of, in consequence of the estate over not being vested, often results in leaving the largest portion of the estate undisposed of.

⁷² See the remarks of Lord-Keeper *Wright*, in *Yate v. Fettyplace*, Prec. in Ch. 140; s. c. 2 Vern. 416; also Cod. lib. 6, tit. 53, § 5.

⁷³ *Lane v. Goudge*, 9 Vesey, 225.

⁷⁴ *Booth v. Booth*, 4 Vesey, 399, 407; *Jones v. Mackilwain*, 1 Russ. 220. In *Leake v. Robinson*, 2 Mer. 363, 386, Sir *William Grant*, M. R., said: "There is certainly a strong disposition in the court to construe a residuary clause so as to prevent an intestacy, with regard to any of the testator's property." But in *Addison v. Busk*, 14 Beav. 459, Sir *J. Romilly*, M. R., said he could not give to the same words a different construction, when used with reference to a residue, from that which he should when applied to a simple legacy. See also *Lang v. Pugh*, 1 Y. & C. C. C. 718.

But unless the words of the will can be made fairly to bear this construction, that cannot be effected.⁷⁵

35. Where a vested estate is clearly given in the body of the bequest, vague words following are not to be so construed as to render the bequest contingent; as where the testator gave portions for his children, not to be claimed till they arrive at twenty-two, the form of expression being, "not to be claimed or inherited until the children should attain twenty-two." Lord *Thurlow* said,

"It would be a monstrous construction to say that these
* 236 words * prevented the vesting, unless the children should attain twenty-two.⁷⁶ . . . A natural construction may be put upon the words, that he gave the legacy absolutely; that he gave the interest immediately; but the legatee was not to command the principal till twenty-two years of age. Then it is a vested legacy, though the beneficial use is suspended."

36. And where the remainder, or estate over, is given to all the testator's children as tenants in common, it is regarded as a decisive circumstance in favor of an intention that the devisees or legatees shall take vested interests.⁷⁷

⁷⁵ *Lett v. Randall*, 10 Sim. 112. Vice-Chancellor *Shadwell* here says: "One does not like to construe a will so as to make the testator die intestate, unless it is impossible so to construe it as to give effect to what may be fairly collected to have been his intention." But "I do not see how it is possible to put such a construction on the will as to make it a total disposition of the testator's property, in every event that may happen: consequently I think that the safe way is to adhere to the rule of law; and that is, that, if the property in dispute is not given in express words, it is not given at all." See also, upon this general question, *Archer v. Jegon*, 8 Sim. 446, 448. It was here held that where life-interests are bequeathed to several persons in succession, and finally to children or any other class of subjects *then* living, the word "then" is held to point to the death of the last person named, and not to the determination of the several prior interests. See also *Wollaston's Settlement*, 27 Beav. 642. And it will make no difference that the person last named dies in the lifetime of the testator. *Olney v. Bates*, 3 Drew. 319. See also *Hetherington v. Oakham*, 2 Y. & C. C. C. 299; *Widdicombe v. Muller*, 1 Drew. 443; *Cormack v. Copous*, 17 Beav. 397; 1 *Jarman*, 807, and note. But the construction of the word "then" in a will must depend upon the context and surrounding circumstances. *Cresson's Appeal*, 76 Penn. St. 19.

⁷⁶ *Dodson v. Hay*, 3 Br. C. C. 404, 410.

⁷⁷ *Leeming v. Sherratt*, 2 Hare, 14, 21. But a bequest over to such child or children as the first taker may *leave* is contingent. *Bayley's Settlements*, 18 W. R. 481. See also *Watson's Trusts*, id. 642; *McBride v. Smyth*, 54 Penn. St. 245; *Bolton v. Bolton*, 18 W. R. 460. But in *Martin v. Holgate*, L. R.

37. And where the enjoyment of the gift over is postponed to accommodate the estate, as for the payment of debts, or to meet any other burden first imposed, and not chiefly on account of the character or condition of the donor, it is regarded as a decisive circumstance in favor of immediate vesting.⁷⁸

38. Stress is often placed upon the fact that no gift to the donee in remainder is expressed, except with reference to the period of the termination of the intermediate estate; and an attempt is sometimes made to determine the point of the vesting of the estate over upon the question of the *gift* being made presently, and the *payment* only deferred, as where the entire gift is comprised in the direction of payment, or else the bequest itself is created in terms applicable only to the period of the termination of the intervening estate.⁷⁹ In *Leake v. Robinson*,⁸⁰ Sir *William Grant* held, that where there is no gift but by a direction to transfer "from and after" a given event, the vesting must be postponed until after that event has happened, unless from particular circumstances a contrary intention is to be collected. But in *Leeming v. Sherratt*,⁷⁷ Sir *James Wigram*, V. C., places this subject in the clearest light, and shows most conclusively that the mode or form of the bequest is immaterial, and the cases quoted by him seem satisfactory to determine the question whether the gift in remainder was intended to be vested or not. We cannot
 * present this point, which is one of considerable importance, * 237
 in a briefer or better form than in the language of this able
 judge: "Courts of equity, in the construction of wills relating to personal estate, follow the rules of the civil law. By that law, when a legacy is given absolutely, and the payment is postponed to

1 Ho. Lds. Cas. 175, where the estate over was given to such of the testator's nephews and nieces as should be living at the death of his widow, to whom he gave an estate for life, and provided that the issue of any one deceased should take the share of the parent, it was held the estate over vested at the decease of the testator. And in *Austin v. Bristol*, 40 Conn. 120, a similar result is reached, where the devise over was to the testator's children, or the issue of such as should have deceased.

⁷⁸ *Wilson v. Mount*, 19 Beav. 292; *Daniel v. Gosset*, id. 478; Sir *J. Wigram*, V. C., in *Packham v. Gregory*, 4 Hare, 396, 398. Sir *William Grant*, M. R., in *Pearsall v. Simpson*, 15 Vesey, 29.

⁷⁹ *Stapleton v. Cheales*, Prec. in Chan. 318; s. c. 2 Vern. 673; ante, pl. 33, n. 71.

⁸⁰ 2 Mer. 363, 387.

a future definite period, the court considers the time as annexed to the payment and not to the gift of the legacy, and treats the legacy as debitum in præsentì solvendum in futuro. This rule being established, a question was made, whether in the simple case of a direction to pay a legacy at a future period, without any gift of the legacy independently of that direction, the legacy would be transmissible to the representatives of the legatee dying before the time of payment; and the court, in that simple case, has sometimes considered the time of payment as annexed to the legacy itself, and not merely to the payment of it. But the court, in so deciding, has not, I conceive, intended to decide that the gift of a legacy, under the form of a direction to pay at a future time, or upon a given event, was less favorable to vesting than a simple and direct bequest of a legacy at a like future time, or upon a like event; but in fact has intended only to assimilate those cases to each other, and to distinguish both from the class of cases to which I first referred, in which there has been a gift of the legacy, and also a direction to pay at a future* definite time distinct from that gift."

"I have examined most of the reported cases upon the subject, and am confirmed in the opinion I entertained during the argument, that the question is one of substance, and not of form. The question in all the cases has been, whether the testator intended it as a condition precedent that the legatees should survive the time appointed by him for the payment of their legacies; and the answer to this question has been sought for out of the whole will, and not in particular expressions only like those relied upon in this case. In *Monkhouse v. Holme*,⁸¹ Lord *Loughborough* states the rule generally. If the day [gift] is certain, it is vested; but where uncertain, the question will be, 'whether it is in the nature of a condition;' for, if it is conditional, then, in the very nature of the thing, the time is annexed to the substance of the gift; as, in the case of marriage, of puberty, or of any other situation of life, when the arrival of the time is a condition, without which the

* 238 testator * would not have made the gift." And in *May v.*

*Wood*⁸² (a case which is unimpeached in principle), the Master of the Rolls says, "All the cases established this principle, that where the time is mentioned as referring to the legacy itself,

⁸¹ 1 Br. C. C. 298.

⁸² 3 Br. C. C. 471, 473.

unless it appears to have been fixed by the testator as absolutely necessary to have arrived before any part of his bounty can attach to the legatee, the legacy attaches immediately, and the time of payment is merely postponed, not being annexed to the substance of the gift; but if it appears that the testator intended it as a condition precedent upon which the legacy must take place, then, if such condition or contingency does not happen, the gift never arises." In *Barnes v. Allen*,⁸³ the testator gave the residue of his estate to his wife for life, and afterwards to their children; and, if she should die leaving no child or children at the time of her death, he willed that his trustees should transfer the securities in which his estate should then be vested to his two brothers; and, if either brother should die without issue, to the survivor. Both brothers died in the lifetime of the wife of the testator; but it was determined that this substituted interest of the brothers was transmissible to their representatives, although there was no gift to them except in the direction to transfer. So I conceive if a leasehold house were bequeathed to trustees for A., with a proviso, that, if B. returned from Rome within ten years, the trustees should assign the premises to C., such interest as C. took in the premises would be transmissible to his representatives, although he should die within the ten years, provided B. returned from Rome within that period.⁸⁴ In *Saunders v. Vautier*,⁸⁵ the testator gave to his executors and trustees (the same individuals) all the East India stock which should be standing in his name at the time of his death, upon trust to accumulate the interest and dividends which should accrue thereon, until Daniel Wright Vautier should attain the age of twenty-five years, and then to pay or transfer the principal of such East India stock, together with such accumulated interest and dividends, unto the said Daniel Wright Vautier, his executors, administrators, or assigns, absolutely. Under this bequest the court gave Daniel Wright Vautier maintenance out of the fund during his minority, and, upon his attaining * twenty- * 239 one, ordered the whole fund to be transferred to him. It is true, that, in that case, the Lord Chancellor noticed special circumstances which he thought sufficient to decide the question; but he expressed a clear opinion upon the case, independently of

⁸³ 1 Br. C. C. 181.

⁸⁴ See *Fearne Conting. Rem.* 555, ed. 7.

⁸⁵ *Cr. & Phill.* 240.

those circumstances ; and the special circumstances he relied upon with respect to the particular legacy in that case apply by law to a residuary clause without being expressly mentioned. The reasoning of Sir *William Grant*, in *Hanson v. Graham*,⁸⁶ in commenting upon *Boraston's Case*,⁶⁸ *Mansfield v. Dugard*,⁶⁹ and *Doe v. Lea*,⁷⁰ accords with and supports the view I take of the principle of this class of cases. In all the cases which may be supposed to support the plaintiff's argument (against the interest of John in the residue to his representatives), the court has labored to show that the future interest upon which the question arose was, by the terms of the will, contingent ; as a legacy to a person at the age of twenty-one, or "when" or "if" the legatee attained that age, or upon some event which did not happen, — reasoning which would have been superfluous, if the mere circumstance that the gift was future, and that it was given under the form of a direction to pay, had furnished a simple rule of decision. The case of *Thicknesse v. Liege*⁸⁷ falls under the above observation. Of that case it is said⁸⁸ (and we think correctly), "The ground for the final decision seems to have been the clear intention of the testator that all the limitations of the beneficial interest in his residuary property should be contingent, and no person take a vested interest in it before the right of enjoyment accrued."

39. Where a gift over is made to take effect in favor of a class, it is in general held that the gift in remainder is contingent, as to the individual devisees, since the persons composing the class are not to be ascertained until the period of the determination of the intervening estate, and there could be no vesting until the devisees are ascertained.⁸⁹ But in many cases this has been set aside, as an artificial rule, and the estate held to vest at the death of the testator ;⁹⁰ and a distinction is made between a case, where

⁸⁶ 6 Vesey, 239, 246, 247.

⁸⁷ 3 Br. P. C. 365, 373, Toml. ed.

⁸⁸ Roper on Legacies, vol. 1, p. 508.

⁸⁹ Ante, § 2, pl. 2, and notes ; *Andrews v. Partington*, 3 Br. C. C. 60, 401 ; *Ellison v. Airey*, 1 Ves. Sen. 111. See also *Bateman v. Gray*, Law Rep. 6 Eq. 215, reversing s. c. 29 Beav. 447 ; *Gimblett v. Purton*, L. R. 12 Eq. 427.

⁹⁰ *Leake v. Robinson*, 2 Mer. 363, 382, 383. Here the person, to whose children the estate over was given in one event, was the grandson of the testator, and had no children at the date of the will. It was impossible then to suppose the testator could have had any thing like personal preference in designating any particular members of the class. It was a gift to the class in the abstract so far as preference among its members was concerned. And as the

the * gift over is to the children of the same person first * 240 taking, or those of another. In the former case it was held, in the last case cited, that it must include all the children of the first donee, whether born before or after the death of the testator, the time at which the estate was held to vest.

40. It has often been held that any provision in regard to a particular member of a class, affecting or defining the time of vesting of the estates, or tending to determine whether the estate was intended to be contingent or vested, should be applied to all the members of the class. As where the testator made provision for the children of his daughter to be paid, or transferred to them, at the age of twenty-five, but provided, that, if his daughter should leave but one child, the bequest should become the property of such only child upon his or her attaining the age of twenty-five, and be transmissible to his or her heirs, executors, or administrators, and in case she should leave no child, or such child should not attain twenty-five, then over, it was held, that as the provision, as to the single child, clearly indicated an intention to make the estate contingent upon such child attaining twenty-five, it must be presumed the same intention existed as to all the children, if more than one.⁹¹

41. But the character of a clear gift will not be changed, so as to become contingent, by reference to the conditional character of a prior gift to a class.⁹² And, as already stated, where a gift is made to a class, in such terms as to leave it doubtful whether a vested interest was intended to be created, but followed by a provision, in case there should be but one child, clearly indicating that it was intended to create a vested estate at the decease of * the testator, it was held such must have been his inten- * 241 tion as to all the members of the class.⁹³

42. But where the bequest is to each of the members of a class, or where one or more of the members are excluded, thus indicating gift was not to take effect in possession until the decease of the father of the children thus designated as a class, it was impossible to suppose the testator could have intended to exclude any of the class, there being no ground upon which it was possible to conjecture that any such discrimination would or could have been made.

⁹¹ *Judd v. Judd*, 3 Sim. 525; *Tracy v. Butcher*, 24 Beav. 438.

⁹² 1 *Jarman*, 809. See also *Walker v. Mower*, 16 Beav. 365.

⁹³ *King v. Isaacson*, 1 Sm. & Gif. 371. See also *In re Bartholomew*, 1 Mac. & G. 354.

that the bequest was designed for the individual members of the class, it will be held to create a present vested interest.⁹⁴

43. And where the gift is expressed to be only to the children who, or such children as, shall attain a certain age, it has been considered that there was no room for construction, but that it was clear that no estate could vest except upon the condition of attaining the prescribed age.⁹⁵ Where there is a provision for the application of all or a portion of the income of the fund towards the maintenance of the persons finally entitled to the corpus of the estate, any words of contingency, which will fairly bear that construction, will be referred to the provisions in regard to expenditure of the income.⁹⁶

44. Where a residue is given to a class, directly, and it * 242 consists partly of reversionary property, the class is to be ascertained at once, and not, from time to time, as the reversions fall in and become distributable.⁹⁷ A marked distinction obtains between a legacy to one for life, and then to such of the

⁹⁴ *Eccles v. Birkett*, 4 DeG. & S. 105. See also *Bree v. Perfect*, 1 Coll. C. C. 128.

⁹⁵ *Newman v. Newman*, 10 Sim. 51; ante, pl. 24; 1 Jarman, 810, 811. See also *Bull v. Pritchard*, 1 Russ. 213; *Boreham v. Bignall*, 8 Hare, 131; *Bute v. Harman*, 9 Beav. 320; 16 id. 166, n.; *Southern v. Wollaston*, 16 Beav. 166; *Hatfield v. Pryme*, 2 Coll. C. C. 204; *Farrer v. Barker*, 9 Hare, 737; *Little v. Daniel*, 12 Jur. 167; *Bickford v. Chalker*, 2 Drew. 327; *Re Payne*, 25 Beav. 556. And where the devise was to A. for life, remainder to the children of B. if he have any children him surviving, but if not then to C.; B. survived A., at whose death he had three children, and two had been born since; it was held to be a contingent remainder in the children of B. who should survive B. and be alive at the decease of A. But as B. survived A., the life-estate on which the remainder depended fell before the estate in remainder could attach, in consequence of which the latter became inoperative, and the estate after the death of A. went to the heir. *Price v. Hall*, Law Rep. 5 Eq. 399. See also *Howard v. Collins*, id. 349. But where the estate in remainder vests during the continuance of the life-estate, the estate in remainder will be upheld, although its enjoyment is deferred. *West v. Miller*, Law Rep. 6 Eq. 59. The subject of estates in remainder vesting before the time fixed for enjoyment is very carefully considered and the cases extensively examined by Mr. Justice *Swayne*, in *Dee d. v. Considine*, 6 Wallace, 458, and the conclusion of the court dissented from by two of the justices, *Grier* and *Clifford*; s. p. *Holloway v. Webber*, Law Rep. 6 Eq. 523; *Merry v. Merry*, 17 W. R. 985; *Dowling's Trusts*, L. R. 14 Eq. 463.

⁹⁶ 1 Jarman, 811; *Bradley v. Barlow*, 5 Hare, 589.

⁹⁷ *Hagger v. Payne*, 23 Beav. 474.

children of the cestui que vie as shall attain a certain age, and a gift over to the children generally. In the former case the class is to be ascertained only when the contingency happens; and in the latter it must be determined at the death of the testator, from which date the will speaks. And all the children then living take a vested interest, not liable to be defeated, even by the death of the child during the continuance of the intervening estate.⁹⁸ And where the actual distribution is postponed till the termination of the life-estate, for the convenience of the estate, and not to determine who shall be entitled, it does not hinder the estate, given over, from vesting in those entitled at the death of the testator.⁹⁹ The case of *Beck v. Burn*,¹⁰⁰ which seems to hold a contrary rule, is here doubted, or denied to be law. But it has been held that where a sum of money is given to be divided among a class, when the oldest attains twenty-one years, whether the gift be vested or contingent, all who come into the class before the period of division are entitled to shares.¹⁰¹ The construction is generally in favor

⁹⁸ *Adams v. Roberts*, 25 Beav. 658. See also, upon the question of the vesting of legacies, *Smith v. Colman*, 25 Beav. 216; *Edwards v. Edwards*, 15 Beav. 357; *Bowers v. Bowers*, L. R. 5 Ch. App. 244; *Hill's Trusts*, L. R. 12 Eq. 302; *Heathcote's Trusts*, L. R. 9 Ch. 45. In the latter case it is held that a bequest to A. for life, and then to B., but if B. die without issue, then to C., this is to be construed if B. die without issue in the life of A.; but if not, then B. takes an indefeasible estate. See also *O'Mahoney v. Burdett*, 23 W. R. 361; *Ingram v. Soutten*, id. 363. But finally in the House of Lords, in *O'Mahoney v. Burdett* and *Ingram v. Soutten*, 23 W. R. 361, 363, L. R. 7 Ho. Lds. 408, the case of *Edwards v. Edwards*, supra, so far as the ground of decision is concerned, is overruled; and it is held, that where an estate is given over upon the death of B. without issue, if B. so die at any time, the estate over takes effect, unless there be some clear expression of a contrary intention in the deviser or settler, and that it is not implied that he shall die during the life of the deviser. We have thus, after so long a time and so many judicial refinements, a return, in the court of last resort, to the natural and ordinary import of the language used. *Olivant v. Wright*, L. R. 20 Eq. 220; ante, pl. 3 a; *Home v. Pillans*, 2 My. & K. 15. In the two latter cases the subject is very elaborately considered, and the authorities extensively reviewed.

⁹⁹ *Leeming v. Sherratt*, 2 Hare, 14; *Leake v. Robinson*, 2 Mer. 363; *Packham v. Gregory*, 4 Hare, 396; *Neatherway v. Fry*, Kay, 172; *Hearn v. Baker*, 2 Kay & J. 383. See also *Lloyd v. Lloyd*, 3 Kay & J. 20; *Gillman v. Daunt*, id. 48; *Bennett's Will*, id. 280; *Wharton v. Barker*, 4 Kay & J. 483; *Maddison v. Chapman*, id. 709; *Devane v. Larkins*, 3 Jones, Eq. 377.

¹⁰⁰ 7 Beav. 492.

¹⁰¹ *Mann v. Thompson*, Kay, 638.

of vesting.¹⁰² And a gift over is allowed to operate, notwithstanding the intervening estate may fail, for a reason not named in the will, or probably in the contemplation of the testator.¹⁰³

* 243 * 45. The general rule, both in England and in the American states, in regard to the time of vesting of legacies given to a class, seems to be, that it shall be deferred until the time of payment, especially where they are charged upon real estate.¹⁰⁴ But it was said, a portion for younger children, so secured, may be held to vest when the child comes of age, although he die before the settler.

46. But where the gift is to all of a class *when and as* they attain a prescribed age, the construction has been that the period named had reference to the estate becoming absolutely fixed in possession. And where there is a provision for the estate going over, in case no child attains that age, it affords strong reason for saying, that the testator only intended the estate to be divested upon this condition subsequent.¹⁰⁵

¹⁰² Day v. Day, Kay, 703. See also Porter's Trust, in re, 4 Kay & J. 188; Wildman's Trust, in re, 7 Jur. n. s. 121.

¹⁰³ Warren v. Rudall, 4 Kay & J. 603. The cases upon the subject, and especially Attorney-General v. Hodgson, 15 Sim. 146, and Philpott v. St. George's Hospital, 21 Beav. 134, are here thoroughly reviewed. See also Corbett's Trusts, Johns. (Eng. Ch.) 591; Penny v. Clarke, id. 619.

¹⁰⁴ Remnant v. Hood, 6 Jur. n. s. 1173. This was a decision of the Court of Chancery Appeal, affirming the decision of the Master of the Rolls. See also White v. Baker, 6 Jur. n. s. 591, where it is said, that the case of Scurfield v. Howes, 3 Br. C. C. 90, is not at variance with the other cases, as suggested, 1 Jarman on Wills, 704. See also Smell v. Dee, 2 Salk. 415; Onslow v. South, 1 Eq. Cas. Ab. 295, pl. 6; Gordon v. Rutherford, Turn. & Russ. 373; Scurfield v. Howes, 3 Br. C. C. 90; Bruce v. Charlton, 13 Sim. 65; Murray v. Tancered, 10 Sim. 465; Billingsley v. Wills, 3 Atk. 219; Bennett v. Seymour, Ambler, 521; Bielefield v. Record, 2 Sim. 354; Jennings v. Looks, 2 P. Wms. 276; Harrison v. Naylor, 3 Br. C. C. 108. As to the effect of the word "payable" in a bequest. Haydon v. Rose, L. R. 10 Eq. 224. In re Wilmott's Trusts, L. R. 7 Eq. 532, commented upon. See also Chevaux v. Aislabie, 13 Sim. 71; Sansbury v. Read, 12 Vesey, 75. And the American courts adopt the rule stated in the text. Mackie v. Alston, 2 Desaus. 362; Hawkins v. Everett, 5 Jones, Eq. 42; Simpson v. Spence, id. 208. But see Faribault v. Taylor, id. 219; Gay v. Baker, id. 344; Whitehead v. Lassiter, 4 id. 79; Wessinger v. Hunt, 9 Rich. Eq. 459. Where the bequest rests upon a double contingency. Watson's Trusts, in re, L. R. 10 Eq. 36.

¹⁰⁵ 1 Jarman, 812; Edwards v. Hammond, 3 Lev. 132; Lord Langdale, M. R., in 12 Beav. 198. It is unquestionably true, as suggested by Mr. Jarman (vol. 1,

47. It has generally been considered, that where real and personal estate are included in the same bequest, and the real estate * is held vested, that the same construction will be * 244 applied to the personal estate.¹⁰⁶

48. In the later English cases there is manifested a very uniform tendency to hold in all bequests of the residue of an estate to children, as a class, and where the vesting is in the first instance postponed to a given age, and this is accompanied with a direction which gives a discretion to apply the whole or a part of the intermediate income for the maintenance of such children, and the bequest contains a provision disposing of the shares of such as die before attaining that age, in any mode, either absolutely or upon contingency, that the gift over is to be considered as explaining the testator's intention to be, that the *absolute* ownership only was intended to be suspended, and in the mean time that the legatees should take vested interests, subject to be divested upon the failure to reach the prescribed age.¹⁰⁷

p. 813) in regard to *Vaudry v. Geddes*, 1 Russ. & My. 203, where the estate was held contingent, that many of the cases have been decided upon too narrow grounds, upon a single circumstance, without taking into account others of equal or greater force, and which in other cases have controlled the decision. *Bland v. Williams*, 3 My. & K. 411. And where the testator directed his residuary estate to be divided among his four sons, and, upon the decease of either without issue, his share to revert to the remainder then living, or their child or children, it was held that each of the four sons took an absolute interest, subject to be divested upon his decease without issue. *Dowling v. Dowling*, 12 Jur. N. S. 720; s. c. Law Rep. 1 Ch. App. 612. See also *Cardigan v. Curzon-Howe*, L. R. 9 Eq. 358. It was held in *Radford v. Willis*, L. R. 7 Ch. App. 7, that a devise to an unmarried woman for life, remainder in fee to her husband, creates an indefeasible vested remainder in fee in her first husband.

¹⁰⁶ *Farmer v. Francis*, 2 Sim. & Stu. 505; *Tapscott v. Newcombe*, 6 Jur. 755; *James v. Lord Wynford*, 1 Sm. & Gif. 40.

¹⁰⁷ *Davies v. Fisher*, 5 Beav. 201; *Harrison v. Grimwood*, 12 Beav. 192. Lord *Langdale*, in the case first cited, quotes authority to show that the dicta of Sir *J. Leach*, M. R., in *Vaudry v. Geddes*, supra, and *Bland v. Williams*, supra, in conflict with the rule there laid down by him, were not tenable. See also *Bree v. Perfect*, 1 Coll. C. C. 128; *Colley's Trusts*, Law Rep. 1 Eq. 496; *Hunter's Trusts*, id. 295.

In *Whitter v. Bremridge*, Law Rep. 2 Eq. 736, a gift of property in trust to sell and invest and pay the proceeds and interest to one upon his attaining the age of twenty-one, but upon his not attaining, or dying without male children, then to others, was held to create a vested interest, subject to be divested upon the events named.

49. The conclusion of the learned author and editors of the last English edition of Jarman on Wills is, that although some of the cases point to a rule containing all the cases upon this subject, "yet the state of the authorities, on the whole, hardly warrants any general position of this nature."¹⁰⁸

50. We think, however, that it may be safely affirmed of the general force and effect of the more recent English cases, that they do establish the propositions, —

(1.) That it is competent for the testator in terms to direct whether the estate over shall vest or not; and when this is done, all construction is excluded.¹⁰⁹

* 245 * (2.) That where there is reasonable ground for saying that, upon the whole, it is just to suppose the testator expected a devisee or legatee over to take a vested interest, the court will so construe the bequest.

(3.) That no estate will be held contingent unless very decisive terms of contingency are used in the will, or it is necessary to hold the same contingent in order to carry out the other provisions and implications of the will.

51. In addition to what we have already stated in regard to what estates are devisable,¹¹⁰ it may be proper to state here that all estates where there is any present interest, however remote or contingent, are devisable and transmissible by descent. It is not

¹⁰⁸ 1 Jarman, 816.

¹⁰⁹ In *Thompson v. Thompson*, 28 Barb. 432, where the will in terms provided that the income of the testator's estate should be applied to the support of the testator's children during minority, and that, upon the arrival of his sons at the age of twenty-one years, their shares should be paid to them, and that these shares should vest at this time, and not before, provided that, if any son should die before the age of twenty-one leaving issue, such issue should stand in the place of the parent, it was held that the shares vested in interest at the testator's death, liable to vest in possession upon the sons arriving at full age, and that, where one son died before the age of twenty-one without issue, his share would be distributed according to the statute of distributions. See *Bernard v. Mountague*, 1 Mer. 422; *Law v. Thompson*, 4 Russ. 92. But where a legacy was given to a class equally, payable upon the decease of A., with a declaration that the shares of the members of the class should be "vested" interests on majority or marriage, and the income, in the event of A.'s death in the mean time, to be paid towards the maintenance and education of such persons, it was held that such legacy was a vested interest from the decease of the testator, and that the word "vested" in the will meant vested in possession. There was no bequest over. *Simpson v. Peach*, L. R. 16 Eq. 208. See also *In re Peek's Trusts*, L. R. 16 Eq. 221.

¹¹⁰ Ante, pt. 1, § 30, pl. 16.

always easy to define clearly what estates are devisable or transmissible by descent. It seems clear that all vested estates are so devisable and transmissible, even when liable to be defeated by the happening of conditions subsequent. But where the bequest is to a class, as to children when they attain a certain age, or survive any other event, so that the vesting of any interest is made to depend upon the continuance of the life of the devisor until a certain event, it has been said there is nothing which is properly devisable, or which can pass by descent, until the contingency becomes absolute.¹¹¹ But if the full enjoyment of the estate is only deferred until the happening of some collateral event, and there is no provision for divesting the estate upon the failure of that event, there is such a vested interest as will pass by devise or descent. As where the testator bequeaths his personal estate to A., and, if he shall die without issue, to B., there is such a vested interest in B., if he survive the testator, that, although he should die in the lifetime of A., the estate will pass under a devise from * him, or will go to his personal representatives, in the * 246 event of A. dying without issue.¹¹²

52. In *Leeming v. Sherratt*,¹¹³ Vice-Chancellor *Wigram* said: "If there is any case which decides, as an abstract proposition, that a gift of a residue to a testator's children, upon an event which afterwards happens, does not confer upon those children an interest transmissible to their representatives, merely because they die before the event happens, I am satisfied that case must be at variance with other authorities." It was accordingly here decided, that where the testator bequeathed the residue of his estate, real and personal, to trustees, to convert the same into money, and pay it over equally to all the testator's children, so soon as the youngest shall attain twenty-one years of age, and in case of the death of any of the children, leaving lawful issue, the share of

¹¹¹ 1 Jarman, 817; *Read v. Gooding*, 21 Beav. 478.

¹¹² *Barnes v. Allen*, 1 Br. C. C. 181. See also *Perry v. Woods*, 3 Vesey, 204, 208. In the State of New York, any estate is held devisable, as being a possibility coupled with an interest, where the person in whom the interest is to vest, in the event contemplated, is known, or capable of being ascertained, and the terms "descendible" and "devisable" are convertible. *Pond v. Bergh*, 10 Paige, 140.

¹¹³ 2 Hare, 14, 23. See also *Boulton v. Beard*, 3 DeG., M. & G. 608; *Brocklebank v. Johnson*, 20 Beav. 205; *In re Smith's Will*, id. 197; *Parker v. Sowerby*, 1 Drew. 488, 496; *Lloyd v. Lloyd*, 3 Kay & J. 20.

such child to go to such issue, and, in default of issue, to the survivors, that the share of such children as attain twenty-one, but die before the time of division, passed to their representatives.

53. And in a very recent case,¹¹⁴ where the testator devised his real estate to trustees to expend the income in the maintenance of his children until the youngest should attain twenty-one, and then to convert the same into money, and divide the proceeds among his children in certain proportions named, it was held that the children took vested interests upon the decease of the testator, and that the share of a daughter dying before twenty-one passed to her representatives. The Master of the Rolls, Sir *J. Romilly*, here distinguishes between this case and that of *Leeming v. Sherratt*,¹¹³

upon the ground that that was a bequest to a class; and in * 247 such * cases, where one falls out before attaining the prescribed age, it is the same as if he had not existed, the estate passing to the survivors of the class, and so on to those of the class who shall be in existence at the time the estate vests, that being the first period at which the individuals of the class were required to be definitely ascertained. But the case before the court was one where the members of the class are referred to as individuals, and the specific share of each defined in the will, thus showing that each was expected to take a share at the decease of the testator. The learned judge said that if the shares of each child were not so vested, and thus passed to their representatives, he must regard them as undisposed of, and an intestacy to that extent would thus be created.

54. The American cases are very numerous upon the general question of the contingency of an estate in remainder, but generally profess to follow the lead of the English cases. It will be impossible for us to give more than a summary of some of the leading ones in a portion of the states.

55. In Massachusetts the leading case upon this question seems to be that of *Furness v. Fox*,¹¹⁵ where it was held that a bequest to

¹¹⁴ *Cooper v. Cooper*, 7 Jur. N. S. 178. On a devise to the testator's nephews for life, and after that to such male heirs as he now has or may have hereafter, it was held to create a vested interest in all his sons living at the death of the testator, and a contingent interest in those born thereafter to become vested at birth during the life of the father. *Conklin v. Conklin*, 3 Sandf. Ch. 64.

¹¹⁵ 1 Cush. 134; *Emerson v. Cutler*, 14 Pick. 108. In *Bowker v. Bowker*,

the testator's grandson, "if he shall arrive at the age of * twenty-one years, then to be paid over to him by my * 248 executor," was not contingent, but vested. The point is thus stated by Mr. Justice *Metcalf*, as cited from Wooddeson: "If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift as a condition precedent, it is contingent, and not transmissible." This definition is approved by *Shaw*, Ch. J., in *Eldridge v. Eldridge*.¹¹⁶ The learned judge here defines the rule of construction upon this subject thus: "When, therefore, words are equivocal, leaving it in some doubt whether words of contingency or condition apply to the gift itself or to the time of payment, courts are inclined to construe them rather as applying to the time of payment, and to hold the gift rather as vested than contingent." The same rule of construction is clearly established in all the cases in this state where the question has arisen.¹¹⁵ It is so declared by *Morton, J.*, in *Olney v. Hull*; ¹¹⁷ by *Parsons*, Ch. J., in *Dingley v. Dingley*,¹¹⁸ where the rule is thus stated:

9 Cush. 519, where the testator devised his farm, stock, &c., to one of his sons, upon condition that he pay another son one hundred dollars annually, for seven years, without interest, it was held that this became a vested legacy, as soon as the devisee of the farm, &c., accepted the devise to him; and that, upon the decease of the other son before the expiration of the seven years, the unpaid portion of the legacy would go to his personal representatives.

The rule has been repeatedly recognized in this state, in a devise to one for life or widowhood, of the use and improvement of real and personal estate, and at the decease of the first taker, then over, that the person entitled in remainder takes a vested and transmissible interest in both the real and personal estate. *Fay v. Sylvester*, 2 Gray, 171; *Barton v. Bigelow*, 4 Gray, 353. A devise to A. for life, remainder to B. without express words of perpetuity, creates an estate in remainder in fee, and makes the person going into possession under the devisee of the residue of the estate, who had also obtained the release of the life-estate, liable for rents and profits to him in remainder after the termination of the life-estate, but entitles such person to compensation for improvements made by himself or his grantor. *Plimpton v. Plimpton*, 12 Cush. 458.

Contingent interests, both in real and personal estate, are transmissible like vested interests, unless the existence of the devisee of a contingent interest at some particular time enters into the contingency and constitutes part of it, when the contingent interest cannot descend. *Winslow v. Goodwin*, 7 Met. 363.

¹¹⁶ 9 Cush. 516.

¹¹⁷ 21 Pick. 311, 313, 314.

¹¹⁸ 5 Mass. 535, 537. And the same rule is applied in *Shattuck v. Stedman*,

“For it is a rule of law, that a remainder is not to be considered as contingent, when it may be construed, consistently with the testator’s intention, to be vested.” But the rule is not to be pressed so far as to defeat the intention of the testator.¹¹⁹

2 Pick. 468, 469; *Blanchard v. Blanchard*, 1 Allen, 223. See also *Bowers v. Porter*, 4 Pick. 198; *Ferson v. Dodge*, 23 Pick. 287; *Gardiner v. Guild*, 106 Mass. 25; *Darling v. Blanchard*, 109 id. 176.

¹¹⁹ *Shaw*, Ch. J., in *Richardson v. Wheatland*, 7 Met. 169, 171. The provision in a will for loaning \$500 each to certain persons who have served an apprenticeship to a trade, and worked six years in the trade with success, for the term of five years, and at the end of that time giving the trustees of the fund a discretion to remit the principal on payment of the interest, and being satisfied such persons would in future make good use of the money, will not create any such vested interest in such persons before the expiration of the term as to justify the trustees in remitting the payment of the principal to any who shall have deceased during the term. *Trustees of Smith Charities v. Northampton*, 10 Allen, 498.

Where the time of payment of the portions of the testator’s daughters is deferred for the convenience of the estate, and is directed to be paid or invested by the trustees, at the election of the legatees, it will be held a vested interest, and payable to the personal representatives of the legatees, where any decease before payment or making such election. *Fuller v. Winthrop*, 3 Allen, 51; *Lane v. Lane*, 8 Allen, 350.

In the late case of *Pike v. Stephenson*, 99 Mass. 188, it was determined that a devise to the testator’s daughter for life, and, “in the event of her decease, . . . in equal shares to her children and their heirs and assigns for ever,” the daughter having two children at the date of the will and at the death of the testator, one of whom died before his mother, and the other claiming the whole estate against the heirs of the former, created a life-estate in the mother and vested remainders in each of the children from the death of the testator, and consequently that the child surviving the mother and the heirs of the one who deceased before her were, at her decease, entitled to equal shares in the estate, in fee and in possession. The same principle is maintained in a recent case in Pennsylvania, the estate in remainder being held contingent until the tenant for life had one child, in whom the remainder would then vest, and opening from time to time to let in others as they were born. *Fetrow’s Estate*, 58 Penn. St. 424. See also *Myer v. Eisler*, 29 Md. 28; *Taylor v. Mosher*, id. 443; *Stephens v. Evans*, 30 Ind. 39. The following cases in Massachusetts, *Brown v. Lawrence*, 3 Cush. 390, *Wight v. Shaw*, 5 id. 56, *White v. Curtis*, 12 Gray, 54, and *Womrath v. McCormick*, 51 Penn. St. 504, are cited by Mr. Justice *Gray*, in the opinion of the court, in regard to the soundness of which there seems no ground of doubt. *s. P. Hill v. Bacon*, 106 Mass. 578.

But in *Putnam v. Gleason*, 99 Mass. 454, where the devise was to the testator’s daughter for life, and, at her death, to her heirs and assigns, the estate in remainder under the statute in this state, abolishing the rule in *Shelley’s case*,

* 56. The courts in New York have said, "If a legacy is * 249 given to A. to be paid when he attains full age, the gift is absolute, and vests on the death of the testator; but if it is payable when he comes of age, or if, or provided, he lives till he is twenty-one, it does not vest till the contingency happens; and if it never happens, the legacy lapses.¹²⁰ But the legacy, in terms denoting a present gift, is not rendered contingent by being made payable out of the avails of land to be sold at a future period; the use of the land being devised, and the sale postponed until the death or marriage * of the devisee.¹²¹ The time of payment will * 250 not affect the character of an absolute gift.¹²²

57. The point which determines the vesting or lapsing of a was held to be contingent, inasmuch as the persons entitled could not be known until the decease of the tenant for life, according to the maxim, *Nemo est hæres viventis*. The distinction between the two cases is very slight, and the result different; but the reasons assigned in the opinion of the court by Mr. Justice *Foster* seem altogether unanswerable. But if the estate in remainder had been given to the *testator's* heirs, instead of the heirs of the tenant for life, the remainder would have vested at the same time with the life-estate, inasmuch as such a provision must be referred to those who are the heirs of the testator at his decease, and not such as would have been his heirs if he had deceased at the termination of the life-estate. And in such case the "heirs of the testator" is as definite as if the remainder were given to the "children" of the tenant for life, being in existence at the decease of the testator. See the carefully prepared opinion of Mr. Justice *Hoar*, in *Abbott v. Bradstreet*, 3 Allen, 587; also *Dunn v. Bryan*, 38 Ga. 154.

¹²⁰ *Paterson v. Ellis*, 11 Wend. 259; *Andrew v. N. Y. Bible Society*, 4 Sandf. s. c. 156.

¹²¹ *Tucker v. Ball*, 1 Barb. Sup. Ct. 94; *Sharpsteen v. Tillou*, 3 Cow. 651. See also *Tucker v. Bishop*, 16 N. Y. 402; *Arcularius v. Sweet*, 25 Barb. 403; *Pinckney v. Pinckney*, 1 Bradf. Sur. Rep. 269. The right of survivorship refers to the time of vesting, which in most cases is the death of the testator, although the time of enjoyment is deferred. *Dominick v. Moore*, 2 Bradf. Sur. Rep. 201. See, as to the general question, *Arcularius v. Geisenhainer*, 3 Bradf. Sur. Rep. 64; *Pinney v. Fancher*, 3 Bradf. Sur. Rep. 198. In *Roome v. Phillips*, 24 N. Y. 463, where the testator devised real estate to his father for life, remainder to the heir-at-law and only child of the testator, "after the decease of my father, and when he the said child shall become twenty-one, and become married and have children, and in case of his decease before that period, and after my father's decease, then the said real estate" was given over to other persons, it was held that the child took a vested remainder, subject to be divested only on his dying under the age of twenty-one, the provision in regard to marriage and having children being construed as having reference only to such events occurring during the infancy of the child.

¹²² *Turk*, ex parte, 1 Bradf. Sur. Rep. 110.

legacy given in futuro is not whether time is annexed to the gift, but whether it is annexed to the *substance* of the gift, as a *condition precedent*, and that is to be determined, as matter of intention, upon the whole will. And even where upon the words of the gift it would seem that it was not intended to vest until some future period, that may be controlled by other circumstances, as where the fund is to be severed from the estate, and an intermediate accumulation of the interest, or expenditure of it, is directed for the benefit of the legatee. This is regarded as indicating a purpose that the legatee should at all events have the bequest, and only the payment to be deferred.¹²³ A direct bequest is not to be held contingent because the legatees are required to prove their identity within two years after public notice given, or the legacy shall become void.¹²⁴ The fact that the time of payment of a legacy is deferred, and that it is to be raised in a prescribed mode, is no ground of holding the legacy contingent;¹²⁵ or even where the

amount of the legacy is directed to be raised by the sale of
 * 251 the * real estate, the use of which is given during life to the legatee, thus making the legacy payable after the death of the legatee.¹²⁶ The corpus of the legacy was, nevertheless, held to pass to the personal representatives of the legatee.¹²⁶

58. And all bequests of personal estate for life to one, and then over, create vested estates in both; and the estate over is transmissible by devise or descent, where the person entitled in remainder dies during the continuance of the life-estate.¹²⁷ And where the estate over was given by directing the executor to sell the property, after the termination of the life-estate, and "out of the proceeds to pay a legacy to B., to be paid by my executor into her own hand, and upon her own personal receipt, and in small sums, from time to time, at the discretion of my executor, it was held to create a vested interest from the death of the testator.¹²⁸ And a direct gift to a minor creates a vested interest, notwith-

¹²³ Van Wyck v. Bloodgood, 1 Bradf. Sur. Rep. 154; Burrill v. Sheil, 2 Barb. Sup. Ct. 457; Paterson v. Ellis, 11 Wend. 259; Hone v. Van Schaick, 20 id. 564. Accumulation not always evidence of the vesting of the corpus of the fund. Lyman v. Parsons, 28 Barb. 564.

¹²⁴ Ennis v. Pentz, 3 Bradf. Sur. Rep. 383.

¹²⁵ Marsh v. Wheeler, 2 Edw. Ch. 156.

¹²⁶ Sweet v. Chase, 2 N. Y. 73.

¹²⁷ Barker v. Woods, 1 Sandf. Ch. 129.

¹²⁸ Conklin v. Moore, 2 Bradf. Sur. Rep. 179.

standing a gift over in the event of his death before arriving at full age or without heirs; and upon the gift in remainder taking effect, it will only carry the corpus of the fund; the income belongs to the infant, and may be applied for his maintenance.¹²⁹

59. The general rule that legacies charged upon real estate will lapse, where the legatee dies before the time of payment,¹³⁰ applies only to those cases where the postponement is made by the testator, with reference to the situation and circumstances of the legatee, and not where it is done for the convenience of the estate, or of the person charged with the payment of the legacy.¹³¹

And where the testator directed his executors to invest a sum for the benefit of his daughter and her children, to pay her the interest during life, and on her decease to pay or transfer the fund to the children, share and share alike, the shares of the daughters to become vested at their respectively attaining majority or marrying, and those of the sons on their attaining majority, but the share of such as should attain that age before the death of their mother to be postponed until that event, it was held that a son who attained the age of majority, and died * before the mother, * 252 had a vested interest which would pass to his representative.¹³² And where the testator directed his executors to invest \$4,000, and apply the interest to the support of two persons, naming them, till each became twenty-one, and then pay the principal to them or their assigns, in equal moieties, it was held to create a vested legacy in each of the persons named, in a moiety of the sum payable upon attaining majority; and that, if either of the legatees died before attaining that age, his share would pass to his personal representatives.¹³³ It was held also in this case, that a gift over of a legacy does not hinder the vesting, but only divests the legacy, upon the happening of the precise contingency named,

¹²⁹ *Pinney v. Fancher*, 3 Bradf. Sur. Rep. 198.

¹³⁰ *Ante*, § 8, pl. 28.

¹³¹ *Harris v. Fly*, 7 Paige, 421; *Sweet v. Chase*, 2 N. Y. 73.

¹³² *Ex parte Turk*, 1 Bradf. Sur. Rep. 110.

¹³³ *Weyman v. Ringold*, 1 Bradf. Sur. Rep. 40. See also *Parsons v. Lyman*, 20 N. Y. 103; s. c. 18 How. Pr. 193; affirming s. c. 28 Barb. 564, reversing s. c. 4 Bradf. Sur. Rep. 268. A bequest to A., upon condition that he pay a sum to B. within two years from the testator's decease, does not lapse, as to the sum to be paid B. by his decease within the two years, but the same will go to his personal representatives. *Wheeler v. Lester*, 1 Bradf. Sur. Rep. 213; *Same v. Same*, id. 293.

it being in the nature of a condition subsequent, and to be strictly construed.¹⁸⁴ But this rule has not been applied strictly to cases where an estate over after a devise for life is made dependent upon the first devisee, being a widow, continuing such, and if she shall not marry again, it being construed as equivalent to a provision that the estate over shall take effect, if the prior estate is determined either by marriage or death.¹⁸⁵

60. But it seems to be well established, that an estate in remainder will be held contingent, where clearly so expressed, however inconvenient the consequences which may result from it. Thus, where the testator, after devising to his wife the use of his real estate while she remained his widow, provided that, if his wife should marry or die, the land should then be equally divided among his surviving sons, each son as soon as he came into possession of the real estate paying \$60, to be equally divided among his daughters,

it was held that the remainder thus given to the sons was * 253 contingent, until after the death or marriage of the * widow, and that upon her death the estate vested in the surviving son, to the exclusion of the heirs of a deceased son, who died before the widow, but after the testator.¹⁸⁶

61. In Pennsylvania, the questions affecting contingent and vested estates seem to have received a similar construction with that which prevails in England and in the other American states. In a recent case¹⁸⁷ in that state, the rules of construction affecting

¹⁸⁴ See also *Adams v. Beekman*, 1 Paige, 631.

¹⁸⁵ *Luxford v. Cheeke*, 3 Lev. 125; *Gordon v. Adolphus*, 3 Br. P. C. 306; *Lady Fry's Case*, 1 Vent. 199, 203; *Ferson v. Dodge*, 23 Pick. 287; *Bates v. Webb*, 8 Mass. 458; *Whitney v. Whitney*, 14 Mass. 88; *Chappel v. Avery*, 6 Conn. 31.

¹⁸⁶ *Olney v. Hull*, 21 Pick. 311. See also *Emerson v. Cutler*, 14 Pick. 108; *Inches v. Hill*, 106 Mass. 575.

¹⁸⁷ *Smith's Appeal*, 23 Penn. St. 9. The general principles here announced are of the most wholesome and unquestionable character, and are illustrated by the following cases in that State: *Patterson v. Hawthorn*, 12 S. & R. 112; *King v. Crawford*, 17 S. & R. 118; *Magoffin v. Patton*, 4 Rawle, 113; *King v. King*, 1 W. & S. 205; *Donner's Appeal*, 2 id. 372; *Lamb v. Lamb*, 8 Watts, 184; *Moore v. Smith*, 9 Watts, 403; *Seibert's Appeal*, 13 Penn. St. 501; *Reed v. Buckley*, 5 W. & S. 517; *Bayard v. Atkins*, 10 Penn. St. 15; *Candler v. Dinkle*, 4 Watts, 143; *Price v. Watkins*, 1 Dall. 8; *Fleck's Estate*, 1 Parsons, 126; *Newport v. Cook*, 2 Ashm. 332; *Maxwell v. McClintock*, 10 Penn. St. 237; *Masden's Estate*, 4 Whart. 428; *Fairly v. Kline*, 2 Pennington, 754; *Mander-son v. Lukens*, 23 Penn. St. 31, where the general subject is extensively dis-

this subject are thus stated: The law favors an absolute rather than a defeasible estate; a vested rather than a contingent one; the primary rather than the secondary intent; the first rather than the second taker, as the beneficial object of the testator's bounty; and a distribution as nearly conformed to the general rules of inheritance as is consistent with the language of the will. This subject received a careful discussion and examination in the late case of *Letchworth's Appeal*,¹⁸⁸ where it was decided

cussed. See also *Passmore's Appeal*, 23 Penn. St. 381. A bequest of a sum of money to be paid at a future period is a vested legacy; but if there be no gift or bequest independent of that contained in the direction for the payment, it is contingent. Thus, a bequest of a sum of money to grandchildren, to be paid to them respectively when they shall severally arrive at the age of twenty-one years, is a vested legacy. *Bowman's Appeal*, 34 Penn. St. 19; *Inches v. Hill*, 106 Mass. 575.

¹⁸⁸ 30 Penn. St. 175. This subject is discussed in other cases in this state; but these later expositions of the principles involved afford the surest guide to the present state of the law, and will produce less confusion than if we attempted to analyze all the cases found in the large number of reports in that state. See *Talbot v. Calvert*, 24 Penn. St. 327. The late case of *Young v. Stoner*, 37 Penn. St. 105, reaffirms the same general principles, as applicable to the facts of that case, which was a devise to the brother of the testator until his children should attain the age of twenty-one years, and then to such children in fee, charged with the payment of certain sums to the testator's other brothers and sisters, and it was held to create a vested remainder in fee in the children, subject to the particular estate for years; and that the legacies to the rest of the testator's brothers and sisters vested at the death of the testator, and the children of such as died after that would take the shares of such deceased parent. *Chew's Appeal*, 37 Penn. St. 23.

Upon the devise of real estate to A. for life, or for any other term upon which a remainder may be dependent, and then over, whether to persons by name or to a class, the estate over vests at the decease of the testator. And whether it be to the children of the person taking the particular estate, or to the children of any other person, the limitation will embrace not only those alive at the death of the testator, but all who shall come into existence before the period of distribution, unless expressly limited to survivors. And therefore, where the remainder was limited to the surviving children for life, their heirs and assigns, &c., it was held to refer to the death of the testator and not of the first taker, and therefore the share of one tenant in common, who deceased after the death of the testator, and before that of the tenant for life being vested, will descend to heirs. *Ross v. Drake*, 37 Penn. St. 373. And where the evident intent of the will is to give the parent a life-interest, with remainder to the children of such parent, the court will construe the interest, as so far vested as to be transmissible to grandchildren, whose parents de cease during the continuance of the life-estate. *Lantz v. Trusler*, 37 Penn. St. 482.

* 254 * that the law always inclines to hold the whole interest in property as vested rather than contingent, and therefore in case of doubt it declares the interest vested ; that a devise or legacy depending upon an event that is sure to happen is vested, if

* 255 the happening of * the event does not form a part of the description of the devisee, and if the suspensive expressions can, consistently with, or by the aid of, other parts of the will, be properly interpreted as referring, not to the vesting of the title, but to the vesting of the enjoyment. In this case the will was thus expressed : “At and after the decease of my said wife, and in case she should marry, and *when* my youngest child shall arrive at the age of twenty-one, *then* it is my will that all my estate shall be distributed by my executors agreeably to the intestate laws of this state, provided, that in case all my said children shall die without leaving lawful issue, during the lifetime of my said wife, then, and in such case, I devise and bequeath to my said wife all my estate, real, personal, and mixed, to her and her heirs and assigns for ever ;” and it was held that the children of the testator took vested

In the case of *Burd v. Burd*, 40 Penn. St. 182, the same doctrines are reaffirmed, and the case made to turn upon the point whether the contingency attaches to the gift or the time of payment, but all doubtful constructions are made to favor vesting.

The question again came under consideration in this state, in *Womrath v. McCormick*, 51 Penn. St. 504, where the same general principles are maintained. The testator gave his wife a life-interest in all his estate, and at her decease provided that the property should be divided into as many shares as there were children living, or the issue of deceased children, and each to have one share. It was held to create vested interests in such children as survive the testator from the time of his death, the distribution only being deferred. And the fact that at the time of distribution some of these children may have deceased subsequent to the death of the testator will not render the estate in the children contingent. *s. p. Williamson v. Field*, 2 Sandf. Ch. 533. But in *Mair v. Quilter*, 2 Yo. & Coll. C. C. 465, under somewhat similar facts, the interests of those entitled to the remainder at twenty-one were held to vest at that time. But in general a bequest to one and the children of such person, at her decease, is held to vest in the children living at the death of the testator, and in others after-born, as they come in esse. *Spencer v. Bullock*, 2 Ves. Jr. 687 ; *s. p. In re Edmondson's Estate*, Law Rep. 5 Eq. 389. And in this case an express provision that the estate should not vest in any child before the age of twenty-five was construed as meaning should not become “indefeasible.” The general expression, “dying without issue,” may be limited to so dying during the continuance of a particular estate, in order to meet the general intent of the will. *Davenport v. Bishopp*, 2 Yo. & Coll. C. C. 462.

interests under the will, and that the husband of one of the daughters, who died before the time of distribution, leaving no issue, was entitled to her share, the learned Chief Justice — *Lowrie* — adding, “The law of the land so declares, and it is right.”

62. The same general principles have been recognized in most of the American states where such questions have arisen. Many of the cases are collected in the notes of Mr. Perkins, in his edition of *Jarman*.¹³⁹ The subject has been discussed by many of the American courts within the last few years. Thus, in *New Hampshire*,¹⁴⁰ where the testator bequeathed all his estate to a trustee, to invest in his discretion, and to expend for the benefit * of his daughter, not exceeding six per cent of the amount, * 256 including interest, until she arrived at the age of twenty-one, and then to pay her in his discretion, but not exceeding two-thirds of the amount before she becomes thirty years of age, and at the age of thirty-five to pay her the whole, including interest; the daughter died at the age of twenty-four, — it was held that her personal representative was entitled to the whole fund immediately upon her decease. A devise to M. D., to descend to his youngest son and the oldest male heir of said son, and, on failure of such issue, to the heirs of M. D. for ever, gives the youngest son of M. D. a life-estate only: the fee, subject to such contingent devise for life, vests in M. D.¹⁴¹ Where there is a devise to two in succession, and the first devise lapses by the death of the

¹³⁹ 1 Perkins's *Jarman*, 758, and note. See *Gifford v. Thorn*, 1 Stockt. Ch. 702; *Bunch v. Hurst*, 3 Desaus. 273; *Perry v. Rhodes*, 2 Murph. 140; *Caldwell v. Kinkead*, 1 B. Mon. 228; *Gregg v. Bethea*, 6 Porter, 9; *Roberts v. Brinker*, 4 Dana, 570. Mr. Fish, in his edition of *Wms. Ex'rs*, 1859, vol. ii. p. 1083, has a carefully prepared note upon this subject, in which he refers to many of the American cases, and the following among others, which will be found to support the doctrines of the text: *Spence v. Robins*, 6 Gill & J. 507; *Boon v. Sinkler*, 1 Bay, 369; *Tazewell v. Smith*, 1 Rand. 313; *Lemonnier v. Godfroid*, 6 Har. & J. 472; *Chesnut v. Strong*, 1 Hill, Ch. 122; *Kibler v. Whiteman*, 2 Har. 401; *Watson v. Woods*, 3 R. I. 226; *Bridgewater v. Gordon*, 2 Sneed, 5; *Gill v. Weaver*, 1 Dev. & Batt. Eq. 41; *Hogan v. Hogan*, 3 Dana, 572; *Hathaway v. Leary*, 2 Jones, Eq. 264; *Phillips v. Johnson*, 14 B. Mon. 172.

¹⁴⁰ *Felton v. Sawyer*, 41 N. H. 202. It is held in this state, where the statute of uses is in force, that a devise of land to one for the use of another creates no trust, but only a naked use, which the statute immediately executes, thus vesting the legal estate in the cestui que use. *Hayes v. Tabor*, 41 N. H. 521.

¹⁴¹ *Dennett v. Dennett*, 43 N. H. 499.

devisee during the life of the testator, the devise over takes effect immediately upon the death of the testator;¹⁴² and it will make no difference that the intermediate estate is charged with the payment of debts and legacies; the devise over will take effect, clear of the charges.

63. It is held in Virginia, that a bequest of real and personal estate to the children of A., "provided either of them shall live to the age of twenty-one," and if not, then over, creates in the first takers a vested estate from the death of the testator, subject to be divested by their death before the age of twenty-one;¹⁴³ and

* 257 * also that an estate in remainder, depending upon a prior life-estate, vested at the death of the testator in such a manner as not to be liable to be divested upon the decease of those entitled in remainder, during the continuance of the life-estate, but would pass to the heirs or the next of kin of such persons.¹⁴⁴

64. It has been held in Florida, Georgia, and some other states,

¹⁴² *Brown v. Brown*, 43 N. H. 17, citing *Yeaton v. Roberts*, 28 N. H. 468; 4 Com. Dig. Estate by Devise, K.; *White v. Warner*, 3 Doug. 4. The principle is recognized in New York. *Lawrence v. Hebbard*, 1 Bradf. Sur. Rep. 252; *Goodall v. McLean*, 2 id. 306; *Campbell v. Rawdon*, 18 N. Y. 412. A devise of land to A. for life, remainder to B. for life, remainder to the heirs of B., makes the estate of B. contingent during the life of A., and his release of the title during the life of A. will not estop the heirs of B. from claiming the remainder of the estate after the death of both A. and B. *Hall v. Nute*, 38 N. H. 422. So in a devise to one for life, remainder to his oldest son, the remainder is contingent, and not assignable during the continuance of the life-estate by him entitled in remainder. *Robertson v. Wilson*, 38 N. H. 48. A devise to testator's grandson, to be paid him when he shall arrive at the age of twenty-one years, vests at the death of the testator; and if the legatee die before twenty-one, the money will go to his representative. *Brown v. Brown*, 44 N. H. 281; s. p. *Snow v. Snow*, 49 Me. 159. But where time is of the essence of the gift, it is contingent, and lapses by the death of the legatee before the time. *Ib.*

¹⁴³ *Raney v. Heath*, 2 P. & H. 206. It was here decided that the first takers could not be required to give security for the preservation of the property for the benefit of those entitled in remainder, unless there was evidence of danger of the loss of the property.

¹⁴⁴ *Cowan v. Epes*, 2 P. & H. 520. So a devise to A., remainder to his children, if any; if not, remainder to B. After the death of the testator, A. marries and has children. It was held that the estate in remainder vested in such children as they were born, opening to let in each successive child as it came into existence, so that upon the birth of the first child the remainder to B. was defeated. *Cooper v. Hepburn*, 15 Gratt. 551.

that the postponing the time of distribution of an estate until the testator's widow shall marry again, or his children come of age, or until the youngest child shall come of age, does not hinder the vesting of a present and transmissible interest.¹⁴⁵

65. But in Alabama it was held, under very similar circumstances, that the estate was contingent until the time fixed for distribution; and that only those legatees who were living at that time were entitled to a share.¹⁴⁶ But this seems to be at variance with the general course of decision upon this question.¹⁴⁵ And it was so held in a case involving similar principles in the State of Tennessee.¹⁴⁷ So also in Delaware.¹⁴⁸

66. Where the estate in remainder is dependent upon the life-estate of the testator's widow, who waived the provisions of the * will and took her share under the statute, it was held * 258 that estates in remainder vested immediately upon the determination of the estate or interest of the widow.¹⁴⁹

¹⁴⁵ *Young v. McKinnie*, 5 Fla. 542; *Everett v. Mount*, 22 Ga. 323. And a devise to one in trust for the benefit of another, "should he live to be twenty-one years of age," but otherwise, then over, confers a vested interest immediately upon the testator's death, subject to be divested upon the happening of the contingency. *Bowman v. Long*, 23 Ga. 242. A bequest of all the testator's personal property to his wife and children, share and share alike, "each child to draw *their* share as *they* come of lawful age or marry," creates a vested legacy in the children. *Cox v. McKinney*, 32 Ala. 461. So also on a bequest to the widow during life or widowhood, and after the termination of her right all the remainder of the property to be divided between two of the testator's children, they take vested interests from the death of the testator. *Thrasher v. Ingram*, 32 Ala. 645. See also, to the point stated in the text, *High v. Worley*, 32 Ala. 709. A remainder to children of the tenant of the particular estate opens to let in after-born children until the period of distribution. *Nichols v. Denny*, 37 Miss. 59.

¹⁴⁶ *Travis v. Morrison*, 28 Ala. 494.

¹⁴⁷ *Harris v. Alderson*, 4 Sneed, 250.

¹⁴⁸ *Conwell v. Heavilo*, 5 Harring. 296.

¹⁴⁹ *Holderby v. Walker*, 3 Jones, Eq. 46. The courts in this state hold the general rule, that estates are to be construed as vested rather than contingent, whenever the expressions in the will are ambiguous or the intention doubtful. *Devane v. Larkins*, 3 Jones, Eq. 377, where the rule is applied to a case, where the distribution of the estate is deferred, until the widow shall marry again, or the children severally come of age, when each is entitled to his or her share. But in a bequest to one for life, and then to the children of my daughters who are then living, the estate in remainder is contingent until the death of the tenant for life, and then vests in the children living at that time. *Freeman v.*

67. It was held in Tennessee, that where the testator left all his real and personal estate to his wife, remainder to his eleven children, and by a codicil vested the shares of seven of the children in three of the sons, in trust, to be managed by them for the benefit of such children, after the death of the widow, — the codicil also providing that if either of the children died without any heirs of the body, his share should return to the estate, and be divided among those still living, — that the codicil gave a present vested interest, with executory devise over on the happening of the contingency, and that upon the death of one of the children during the continuance of the life-estate, leaving no issue, his share would follow the common rule of descent, and go to his personal representative, and be subject to the payment of his debts after the falling in of the life-estate.¹⁵⁰

68. In Connecticut it was held that a devise to the testator's wife during life, and, after her death, to his niece, to her and her heirs during her natural life, and, after her death, that her son * 259 * should be the sole heir of such estate, created in the last taker a vested remainder from the death of the testator; and if such devisee in remainder died after the decease of the testator, and before that of the intermediate devisees, the remainder would go to his lawful heirs.¹⁵¹

Okey, 3 Jones, Eq. 473. In a conditional limitation of an estate, if the person to take is certain, his representative is entitled to the interest limited to him, although he die before the happening of the event on which the estate in remainder was to vest in possession. *Hall v. Robinson*, 3 Jones, Eq. 348. In a bequest to a class, if one die before the testator, it is the same as if such one had never existed. *Washington v. Emery*, 4 Jones, Eq. 32. Upon a bequest of property, the income to be applied to the maintenance of three of testator's children, until the youngest shall come of age, then to be converted into money and divided among all the testator's children, this creates vested interests in all the children from the death of the testator; and upon the death of one or more of them before the youngest comes of age, the interest of such child or children devolves upon the next of kin. *Williams v. Smith*, 4 Jones, Eq. 254; *Sims v. Smith*, 6 Jones, Eq. 347. See post, § 18, pl. 18, n. 33.

¹⁵⁰ *Petty v. Moore*, 5 Sneed, 126.

¹⁵¹ *Throop v. Williams*, 5 Conn. 98. And in the recent case of *Dale v. White*, 33 Conn. 294, it was held that a legacy given to one, or to a class, to be paid or divided at a future time, takes effect, in point of right, at the decease of the testator. And in such cases, where words of contingency are words which may apply either to the gift or the time of payment, courts will incline to apply them to the latter. Thus, where the testator gave certain property to his grandchildren, to be equally divided among them when the youngest should

69. It has been held in Ohio,¹⁵² that a future contingent interest in the nature of a contingent remainder or executory devise is such an existing interest in the land as is transmissible by devise or deed, and of course by descent.

70. In cases where the testator has the power of appointment merely, it seems to have been held that no interest vested in the appointee until the period for enjoyment should arrive. Thus where, by the original gift, the money was to be paid to sons at twenty-one, and to daughters at that age or marriage, if the appointer should be then deceased, otherwise three months after his death, two of the children having attained twenty-one and died before the appointer, no interest was held to have vested in them.¹⁵³ But a legacy charged on real estate, and payable when the youngest child of testator should attain twenty-one, was held to vest before that period.¹⁵⁴

* 71. It was held that where the bequest of the residuary * 260 estate was upon trust to transfer to great nephews and nieces, the share of boys at twenty-one and those of girls at that age or marriage, and to accumulate in the mean time, with right of survivorship, and at the death of the testator there were two great nephews and three nieces, and afterwards another great-nephew was born, while all the others were under age, and none of the girls married, that the legacies were contingent until one of the

come of age, the income in the mean time to be drawn by the parents, and divided among the grandchildren, according to their number at the time of drawing, in the discretion of the parents, and the youngest grandchild died before coming of age, and one other of the number also died before the youngest, it was held that both these had acquired a vested interest in the gift, which accrued to their heirs or next of kin. But such deceased legatees had no interest in the income accruing after the decease of either, and before the time of distribution. See also *Austin v. Bristol*, 40 Conn. 120.

And upon a devise of the use of real estate to the testator's widow during life, and at her death to such of his children as were then living, it was held that one of the children had such a vested interest in the estate during the life of the widow, that it would vest in his assignee in bankruptcy, so as to defeat all right in such bankrupt to petition for a distribution of the estate after the decease of the widow. *Nash v. Nash*, 12 Allen, 345. See also *Colt v. Hubbard*, 33 Conn. 281.

¹⁵³ *M'Ghie v. M'Ghie*, 2 Madd. 368.

¹⁵⁴ *Brown v. Wooler*, 2 Yo. & Coll. C. C. 134; s. r. *Bolger v. Mackell*, 5 Vesey, 509; *Sidney v. Vaughan*, 2 Br. P. C. 254; *Howes v. Herring*, 1 M'Clel. & Yo. 295.

legatees became of age or one of the girls married, and consequently the after-born one was entitled to share.¹⁵⁵

72. Where interest is directed to be paid on a legacy, it will be treated as vested from that period.¹⁵⁶ And where the estate is held in trust to invest and improve for children till a certain age, it will be held a vested interest in the legatees.¹⁵⁷

73. A bequest to A., and, in case of his death, to B., is construed as a provision to save the lapsing of the legacy, and to mean in case of his death during my lifetime; so that, if both survive the testator, A. takes the bequest absolutely.¹⁵⁸

¹⁵⁵ *Balm v. Balm*, 3 Sim. 492. See also *Elwin v. Elwin*, 8 Vesey, 547; *Wadley v. North*, 3 Vesey, 364; *Morgan v. Williams*, 14 L. J. N. S. 449; *Home v. Pillans*, 2 My. & K. 15; *Mocatta v. Lindo*, 9 Sim. 56; *Watson v. Watson*, 11 Sim. 73; *Mair v. Quilter*, 2 Yo. & Coll. C. C. 465; *Pinbury v. Elkin*, 1 P. Wms. 563; *Stanley v. Wise*, 1 Cox, 432; *Hervey v. M'Laughlin*, 1 Price, 264; *Harrison v. Foreman*, 5 Vesey, 207; *Browne v. Lord Kenyon*, 3 Madd. 410; *Sturgess v. Pearson*, 4 Madd. 411; *Clutterbuck v. Edwards*, 2 Russ. & My. 577; *Lucas v. Carline*, 2 Beav. 367; *Mytton v. Boodle*, 6 Sim. 457; *Cousins v. Schroder*, 4 Sim. 23; *Taylor v. Bacon*, 8 Sim. 100; *Butcher v. Leach*, 5 Beav. 392; *Locker v. Bradley*, 5 Beav. 593; *Cohen v. Waley*, 15 Sim. 318; *Woodstock v. Shillito*, 6 Sim. 416; *Peters v. Dipple*, 12 Sim. 101; *Le Jeune v. Le Jeune*, 2 Keen, 701; *Child v. Giblett*, 3 My. & K. 71; *Laffer v. Edwards*, 3 Madd. 210; *Maitland v. Chalie*, Madd. & Geld. 243; *Whatford v. Moore*, 3 M. & Cr. 270. See *Wilmott's Trusts*, L. R. 7 Eq. 532, commenting upon *Emperor v. Rolfe*, 1 Ves. Sen. 209; *Mendham v. Williams*, L. R. 2 Eq. 396; *Clark's Trusts*, in re, L. R. 9 Eq. 378; *Chell v. Chell*, 23 W. R. 252. Where the devise provides that the issue of any devisee, dying before the vesting of his share, may take in his place, this will not entitle any representative not issue to take such share. *Jeyes v. Savage*, L. R. 10 Ch. App. 555.

¹⁵⁶ *Nize v. Stoney*, 1 Dru. & W. 337.

¹⁵⁷ *Love v. L'Estrange*, 5 Br. Pa. Ca. 59; *Benyon v. Maddison*, 2 Br. C. C. 75; *Parker v. Golding*, 13 Sim. 418; *Hammond v. Maule*, 1 Coll. C. C. 281; *Vivian v. Mills*, 1 Beav. 315; *Whiting v. Force*, 2 Beav. 571; *Woodmeston v. Walker*, 2 Russ. & M. 197; *Baynes v. Prevost*, 8 Jur. 506; *Deane v. Test*, 9 Vesey, 147, 152; *Clarke v. Lubbock*, 1 Yo. & Coll. C. C. 492; *Yates v. Compton*, 2 P. Wms. 308; *Bayley v. Bishop*, 9 Vesey, 6; *Nevill v. Nevill*, 2 Vern. 431; *Breedon v. Tugman*, 3 My. & K. 289; *Rammell v. Gillow*, 15 Law J. Ch. N. S. 35.

¹⁵⁸ *Lowfield v. Stoneham*, 2 Strange, 1261; *Hinckley v. Simmons*, 4 Vesey, 160. And a bequest to two persons in moieties of the income of trust-funds, arising from both real and personal estate, with a provision that on the death of either the funds should be held for the children of each who should be living at her death, when such children should attain the age of twenty-three years, or, being daughters, should marry under that age, was held to vest in the

* SECTION II.

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EXECUTORY DEVISES AND BEQUESTS, AND THOSE IN REMAINDER.

1. An executory devise is a limitation over, which cannot operate by way of remainder.
2. If the estate can take effect as a remainder, it shall.
3. An estate in remainder must be upheld by another estate less than a fee.
4. Such estate must continue until the vesting of that in remainder.
5. Remainder cannot be upheld by a chattel interest, or take effect in futuro.
6. Where the life-estate terminates on condition, the estate over becomes an executory devise.
7. And where the intermediate estate is a conditional fee, that over is an executory devise.
8. Where the executory devise fails by lapse or remoteness, the first taker holds absolutely.
9. The case of *Doe d. Bloomfield v. Eyre* discussed at length.
- n. 16. Explanation of the grounds of the decision in the different courts.
10. The first taker holds the entire estate, where such appears to be the intent of testator.
11. Bequest to widow for life, and then to children, creates vested interest in children.
12. And where the estate over is to go to issue, if there be no issue, it is not defeated.
13. And where a bequest for daughters is held in trust for their issue, this will not affect the estate of those who die without issue.
14. Lord *Cottenham's* illustration of the point in *Lassence v. Tierney*.
15. Where the words of the will are ambiguous, they may be explained by context.
16. So the gift remains absolute upon failure to exercise a power of appointment.
17. Executory devises not defeated by forfeiture or failure of intermediate estate.
18. A change in the intervening estates converts a remainder into an executory devise.
19. And an estate may change from an executory devise to a remainder.
20. Estate may be so framed as to take effect as one or the other in different events.
21. An executory devise not defeated by failure of estate out of which it arises.
22. Where the executory devise and contingent remainder vest in the same person, they do not merge.
23. An estate in fee defeasible by a possible estate over is subject to curtesy and dower.
24. Personality may go to successive owners by executory devise, but not by remainder.

children of each to the exclusion of the children of the other, and as not being too remote. *England v. England*, 17 W. R. 719. See also *Clark v. Henry*, L. R. 11 Eq. 222.

* 262 * 25. Equity will require the tenant for life to furnish inventory; will decree surrender.

26. The rights of tenants for life and those entitled in remainder further explained.
27. The law against perpetuities applies to personal estates in succession.
28. Successive estates cannot exist in chattels of a perishable character, unless in residue.
29. The law of executory devises the same as at common law, in the American states.
30. So also in regard to remoteness, and the effect of estate over being void.
31. It is clear that an executory devise, after indefinite failure of issue, is void.
32. An executory devise may take effect in futuro, without an intermediate estate.
33. An executory devise over cannot be limited upon absolute devise to the first taker.
34. But if the first devise lapses, the devise over will take effect.
35. In those states, where, by statute, estates tail are abolished, or converted into estates in fee-simple, this rule applies to contingent remainders.
36. If the devisees in remainder are incapable of taking, the estate vests in the heirs.
37. Bequests of personalty too remote held to vest absolute property in first taker. Trusts for accumulation held void.
38. Bequest over, on death of first taker without children, means children living.
39. Where part of a trust vests within the legal time, it will be sustained, and the other portion fall.
40. A devise over carries the corpus of the estate, but the income goes to the first taker.
41. Effect of a devise of real and personal estate in fee, as tenants in common, with a devise over where all die, &c.
42. Devise to father, with charge for benefit of son, and, on failure of issue living, then over, creates a fee to all entitled.
43. Construction according to obvious intent, with remainders by implication.
44. Bequest of personalty, with executory bequest over, creates an absolute property, liable to be divested in the event named.
45. In Connecticut, an estate by devise, in the nature of an estate tail, held a fee-simple, on the birth of issue, in tail.

§ 17. 1. AN executory devise is a limitation by will of a future estate or interest in land, which cannot, consistently with the rules of law, take effect as a remainder.¹

2. It is a settled rule of law, that if a devise can take effect, as an estate in remainder, it shall be so regarded.²

3. It being a universal rule of law that an estate in remainder by devise cannot take effect in futuro, except there be an estate of

¹ 1 Jarman (ed. 1861), 820.

² *Purefoy v. Rogers*, 2 Lev. 39; s. c. 2 Saund. 380; *Goodright v. Cornish*, 4 Mod. 256, 258, where it is said, arguendo, and so held by the court, "And it is a known rule of law that it shall not be construed by way of executory devise, if it will admit of any other construction." *Doe v. Provoost*, 4 Johns. 61.

freehold in existence at the death of the testator less than a fee * by which the estate in remainder may be upheld, when- * 263
ever it happens that no such estate is in existence at that
time, the estate in remainder becomes void.³

4. Hence where the devise of an estate to take effect in futuro is not upheld by some subsisting estate from the decease of the testator until the time the future estate takes effect, it creates an executory devise, since it cannot operate as a remainder, unless it be upheld during the entire period of its suspension after the death of the testator by some present subsisting estate. Thus a devise to the children of A., who has no child at the death of the testator,⁴ or to the heirs of the body of a person living at the death of the testator,⁵ cannot take effect as remainders, and are therefore executory devises.⁶

5. A mere chattel interest is inadequate to uphold a remainder in real estate, as a devise for a term of years, and after that a remainder in fee-simple, or fee-tail: the estate over must therefore take effect as an executory devise.⁷ So also a devise in terms to take effect after the death of the testator, and after a given term, or upon the happening of some event.⁸ But if the devise be so expressed that it *may* come into operation upon the determination of the intervening life-estate, it will take effect as a remainder, but as an executory devise, whenever there is a clear necessity of an interval between the intervening life-estate and that in remainder, although the interval be ever so short.⁹

6. Hence where there is a condition annexed to the intervening life-estate which may terminate it before the remainder is provided to take effect, as if the tenant for life shall inherit a certain estate, or shall omit to assume a certain name, as required by the devise,

³ 1 Jarman, 819, 820; *Moore v. Parker*, 1 Ld. Ray. 37; s. c. 4 Mod. 316; s. c. Skin. 558; *Doe v. Earl of Scarborough*, 3 Ad. & Ell. 2, 897; *Wells v. Ritter*, 3 Whart. 208; *Moore v. Howe*, 4 Mon. 199; *Beard v. Rowan*, 1 McLean, 135.

⁴ *Hopkins v. Hopkins*, Cas. t. Talb. 44; *Stephens v. Stephens*, id. 228; *Gore v. Gore*, 2 P. Wms. 28; s. c. 2 Strange, 958; *Bullock v. Stones*, 2 Vesey, Sen. 521.

⁵ *Snowe v. Cuttler*, 1 Lev. 135; s. c. T. Ray. 162; *Doe d. Fonnereau v. Fonnereau*, 2 Doug. 487, and cases cited.

⁶ 1 Jarman, 819.

⁷ 1 Jarman, 821.

⁸ *Reding v. Stone*, 8 Vin. Ab. 215, pl. 5.

⁹ 1 Jarman, 821.

and these conditions any of them take effect so as to terminate the life-estate, the estates in remainder must go into operation

* 264 as * executory devises, since they cannot operate as remainders, unless there be some trust to uphold the fee in the mean time.¹⁰

7. And as a remainder cannot be limited to take effect after an estate in fee-simple, every limitation over, upon the conditional determination of an estate in fee-simple, must take effect as an executory devise. As where an estate is given to A. in fee-simple, but conditioned, that if he shall die before twenty-one without leaving issue, and B. shall then be alive, then over, it is regarded the same as if the devise had been made to take effect over, or in futuro, without any intermediate devise in fee, the fee descending in the mean time to the heir, thus operating by way of executory devise.¹¹

8. The distinction between executory devises and estates in remainder may be carried forward and illustrated by numerous cases; but it scarcely seems important, since whether an estate takes effect as the one or the other is not essential, except in a technical point of view, and for that purpose the rules which we have already stated will be sufficient to solve most questions which will arise.¹² The question of an executory devise after the

¹⁰ *Nicholl v. Nicholl*, 2 Wm. Bl. 1159; *Doe v. Heneage*, 4 T. R. 13; *Nicolls v. Sheffield*, 2 Br. C. C. 215, and Eden's note, citing *Carr v. Ld. Erroll*, 6 East, 68; *Stanley v. Stanley*, 16 Vesey, 491.

¹¹ *Porter v. Bradley*, 3 T. R. 143. See also *Pells v. Brown*, Cro. Jac. 590, 592; s. c. Palm. 131; *Taylor v. Biddall*, 2 Mod. 289; *Fairfax v. Heron*, Prec. in Ch. 67; *Marks v. Marks*, id. 486; *Heath v. Heath*, 1 Br. C. C. 147; *Doe v. Wetton*, 2 B. & P. 324; *Toovey v. Bassett*, 10 East, 460; *Doe v. Timins*, 1 B. & Ald. 530; *Doe v. Webber*, id. 713; *Doe v. Rawding*, 2 id. 441; 1 Eq. Ab. 186, pl. 1; *Gulliver v. Wickett*, 1 Wils. 105; *Doe v. Howell*, 10 B. & C. 201; 1 Jarman, 822. See also *Fisk v. Keene*, 35 Me. 349; s. p. in *Coltsman v. Coltsman*, Law Rep. 3 Ho. Lds. 121; s. c. 16 W. R. 943.

¹² Mr. Fearne, in his treatise on Contingent Remainders, 251, 530, states that a condition or limitation defeating an estate must "defeat or destroy the whole estate to which it is annexed, and not determine it in part only, and leave it good for the remainder," from which Mr. Jarman dissents, as a universal rule, saying, that an executory devise may take effect upon the partial failure of the preceding estate, as well as upon its total failure. Mr. Preston (2 Abst. 139) gives two rules for determining executory devises, which it may be proper to repeat here. 1. Where an estate in fee-simple or fee-tail is, upon some condition or limitation therein named, cut down to a life-estate, and an

* determination of an estate in fee determinable upon con- * 265
dition is well illustrated by the case of *Jackson v. Noble*,¹³
where the testator gave real and personal estate to his daughter A.
and two other persons upon trust to permit A. to receive the
income for life to her separate use, and, after her death, to convey
to her heirs, but, in case A. should marry and have no children,
the property to belong to D., and in case of his decease before A.,
then to his children, it was held that A. took an absolute equitable
estate with an executory gift over to D. and his children, and D.,
having died in the lifetime of A. leaving no children, A. was abso-
lutely entitled to the property. And the same rule applies where
the executory devise is void for remoteness.¹⁴

9. It seems to be well settled that a devise over, which for any
reason is incapable of taking effect, and is therefore inoperative,
leaves the estate in the prior taker the same as if the devise over
had not been attempted to be made. The subject upon this precise
point is a good deal discussed in the case of *Doe d. Blomfield v.*
Eyre,¹⁵ upon the following state of facts: A., in contemplation of
her marriage with B., surrendered, and caused a re-grant of, the
estate which she held in fee, being copyhold, to her own use until
the marriage, and after that to the use of B. for life, and then to
herself and assigns for life; and then to the use of such child or
children of the marriage, and for such estate, and charged with
any sum for the benefit of their other children as she should by
deed or will appoint; and, in default of appointment, to the use of
all the children of the marriage, in equal shares, and in default of
such children, to the use of A., her heirs and assigns for ever, after
the death of B. The marriage took place, and two sons having
been born, A., by a will referring to the power, devised and ap-
pointed the tenement to her eldest son C., his heirs and assigns,
after the death of B., upon condition that C. should pay to D.,
the second son, £200 within one year after the decease of B., or on
D.'s attaining the age of twenty-one. And then the will provided,

estate over is given. 2. Where there is a condition, or limitation of the
estate in fee, as upon death before marriage, and without issue, and an estate
over is given by way of survivorship among several devisees. The first of these
cases is illustrated by *Wright v. Wright*, 1 Vesey, Sen. 409, and the other by
Hanbury v. Cockerell, 1 Roll. Ab. 835.

¹³ 2 Keen, 590.

¹⁴ 1 Jarman, 824.

¹⁵ 3 C. B. 557; s. c. in Exchequer Chamber, 5 C. B. 713.

“but in case neither of my sons shall be living at the decease of B., unto E., the father of B., in trust for sale.” After the date * 266 of the will, four other sons were born of the * marriage. A. died before B., as did also their two sons C. and D. It was held in the Exchequer Chamber, in affirmance of the judgment of the Common Pleas, that the appointment in favor of C. was not rendered void by the subsequent limitation to E., a person incapable of taking under the power.¹⁶ The result here is, that, the appointment to C. being effectual, as to him it operated the same as if no appointment over had been made; it was then an appointment to him if he survived his father, which he did not.

10. This general rule, that, where the devise over fails, the estate remains in the former taker, seems to be recognized as a general principle, where the terms of the first devise are sufficient to carry the whole interest, and there is nothing in the circumstances indicating that such could not have been the intention of the testator. But there are many cases where such rule is held inapplicable, and there seems to be very great uncertainty how far this rule will bear enforcement. It is always to be applied where it is obvious that the testator did not intend the estate to pass from the first taker, except in the particular event pointed out.¹⁷

11. The cases are very numerous where a provision is made for the distribution of an estate among children, upon the decease of the testator's widow, and where all the children predecease the widow; and in all of that class of cases, with few exceptions,

¹⁶ The decisions upon this case in the Common Pleas, and in the Exchequer Chamber, show upon what nice points such questions often turn. The Court of Common Pleas held the entire appointment to C., the eldest son, void, because of its inseparable connection with the devise over, which was confessedly not within the power. The Exchequer Chamber held the two portions of the appointment separable, and that the first part was not avoided by reason of the remainder being void. But, in applying these opposite rules to the case, they reached the same result, viz.: That the appointment did not carry the estate to the eldest son, except in the event of one of the two oldest sons surviving his father; and that event not happening, he took no estate under the appointment. It is here held that the same rules of construction will apply to a devise, in execution of a power, as to an ordinary devise.

¹⁷ *Salisbury v. Petty*, 3 Hare, 86; *Taylor v. Langford*, 3 Vesey, 119. Many of the cases upon this point have already been referred to in § 12. *Joslin v. Hammond*, 3 My. & K. 110; *Lassence v. Tierney*, 1 Macn. & G. 551. See *Savage v. Tyers*, L. R. 7 Ch. App. 356.

depending upon peculiar circumstances, it has been held that the children take vested estates from the death of the testator, and that, in the event of their decease before the time of distribution, * the share of such deceased child will pass * 267 by will, or be transmissible to personal representatives or heirs.¹⁸

12. It is also settled, that where a devise is made to one for life, and afterwards to certain other persons by name, and in the event of any of such persons entitled in remainder dying during the continuance of the life-estate, leaving issue, to go to such issue, it creates a vested interest in all thus entitled in remainder; and any one or more of such persons dying, during the continuance of the life-estate, without leaving issue, the share of such person will be held transmissible, either by will or descent.¹⁹

13. And where the testator provides that the portion of his daughters shall be held in trust by his executors, or other persons appointed for that purpose, during the life of the daughters, and go to their children or issue, if any such they have at their decease, this is regarded as a qualification or limitation of the estate of such daughters only as leave children or issue, and will not affect the vested or transmissible character of the share of such daughters as die without leaving children or issue.²⁰

14. And in *Lassence v. Tierney*,²¹ Lord *Cottenham* attempts to

¹⁸ *Hervey v. M'Laughlin*, 1 Price, 264. The postponement of the interest or enjoyment of the children until after the death of the mother or widow is regarded as done for the convenience of the estate, and not of the substance of the description of the devisee. 1 Jarman, 798; *Wigram*, V. C., in *Packham v. Gregory*, 4 Hare, 396, 398; Sir *W. Grant*, M. R., in *Pearsall v. Simpson*, 15 Vesey, 29.

¹⁹ *Smither v. Willock*, 9 Vesey, 233; *Whittell v. Dudin*, 2 J. & W. 279; *Mayer v. Townsend*, 3 Beav. 443; *Tupper v. Tupper*, 1 Kay & J. 665; *Green v. Harvey*, 1 Hare, 428; *Gray v. Garman*, 2 id. 268; *Yearwood v. Yearwood*, 9 Beav. 276; *In re Bright's Trusts*, 21 Beav. 67. See *Savage v. Tyers*, L. R. 7 Ch. App. 356.

²⁰ *Whittell v. Dudin*, 2 J. & W. 279; *Hulme v. Hulme*, 9 Sim. 644. The Vice-Chancellor, *Shadwell*, here said, "By the first operative words, the testator makes an absolute gift to all his children by his second wife, who should be living when the youngest should attain twenty-one. He then superadds a direction for settling the shares of his daughters. The absolute gift remains except so far as the direction for settling the shares of his daughters has taken it away; and it is not taken away, in the case of a daughter dying without having children."

²¹ 1 Mac. & G. 551.

make the distinction clear by the inquiry, to which we have already alluded,²² whether the testator makes a clear gift to the * 268 legatees in * the first instance, and then superadds a qualification to the mode of enjoyment, in which case, if the super-added qualification fails, or does not apply to all the legatees, those to whom it does not apply will hold their shares, relieved from the qualification, as an absolute estate. But if the qualification as to the time and mode of the legatee receiving or enjoying the estate is part of the gift, and in the nature of a condition precedent, the gift fails unless the condition takes effect.²²

15. The rule in regard to this distinction is, that where the words of the will are explicit, they must be followed; but if there is doubt in that respect, it may be removed by resorting to other portions of the will.²³ Thus, in *Campbell v. Brownrigg*,²⁴ where the testator gave a sum of money to his daughter, directing that the interest only should be paid her during life, and, in case she should marry and have children, the principal to be divided among such children, it was held, upon the construction of the whole will, — the daughter having died without children, — her personal representative, and not the residuary legatee of her father, was entitled to the fund.

16. And the same principle applies where the gift is absolute, except with the qualification of creating a power in the donee to appoint the same among his children, or others; and if that power fails to be put in exercise, the gift remains absolute.²⁵

17. The essential quality of an executory devise, which gives it the great advantage in point of certainty over a contingent remainder, consists, as we have already intimated, in that the former is not liable to be defeated by the unexpected determination of the intervening estate, as where a forfeiture of that estate is

²² Ante, § 16. See also *Billing v. Billing*, 5 Sim. 232; *Ring v. Hardwick*, 2 Beav. 352; *Winckworth v. Winckworth*, 8 id. 576; *Arnold v. Arnold*, 16 Sim. 404; *Eaton v. Barker*, 2 Coll. C. C. 124; *Gurney v. Goggs*, 25 Beav. 334; *Corbett's Trusts*, Johns. (Eng. Ch.) 591; *Norman v. Kynaston*, 7 Jur. n. s. 129; s. c. 29 Beav. 96; 9 W. R. 259.

²³ *Jackson v. Forbes*, Taml. 88.

²⁴ 1 Phill. C. C. 301. See also *Gompertz v. Gompertz*, 2 Phill. C. C. 107; *Seawin v. Watson*, 10 Beav. 200; *Findon v. Findon*, 1 DeG. & J. 380; *Fulerton v. Martin*, 1 Drew. & Sm. 31.

²⁵ *Keates v. Burton*, 14 Vesey, 434; *Mercer v. Hall*, 4 Br. C. C. 326; *Robinson v. Cleator*, 15 Vesey, 526; 1 Jarman, 828.

created by any act of the owner, while contingent remainders are thus wholly defeated, the effect being the same as if the intervening estate had regularly expired before the time of vesting.²⁶

* 18. It sometimes happens that an estate, at the date * 269 of the will, is made to operate as a contingent remainder, by reason of the creation of intervening estates to uphold it; and that the persons to whom these intervening estates were given die before the testator, thus producing a chasm between the death of the testator and the period of the remainder vesting, by which means the estate cannot come into effect as a remainder; in which event it is allowed to operate as an executory devise, there being no technical obstacle to such an estate taking effect in futuro, without the support of any intermediate estate.²⁷ And an estate, which in one event, happening after the death of the testator, would take effect as a contingent remainder, may, by the happening of a different event, not anticipated perhaps, be construed as an executory devise, the courts feeling justified in adopting the construction which will most nearly effect the intention of the testator.²⁸

19. And it is also settled, that an estate, which from the state of circumstances existing at the death of the testator can only operate as an executory devise, may, by a change of circumstances, take effect as a remainder.²⁹

²⁶ *Pells v. Brown*, Cro. Jac. 590. The power of the owner of the intervening estate to effect the destruction of contingent remainders dependent upon it is now controlled by statute in England, and they take effect the same as executory devises, notwithstanding the forfeiture, surrender, or merger of the preceding estates. 8 & 9 Vict. c. 106, § 8. And before this statute the practice was common to provide, that trustees might enter upon the estate upon the happening of any such forfeiture, and thus save the interests of those entitled in remainder. 1 Jarman, 828.

²⁷ 1 Jarman, 829. See also *Hopkins v. Hopkins*, 1 Atk. 581; s. c. Cas. t. Talb. 44; *Doe d. Scott v. Roach*, 5 M. & S. 482.

²⁸ *Hopkins v. Hopkins*, supra; *Doe d. Fonnereau v. Fonnereau*, 2 Doug. 487. And where the widow renounces the provisions of the will in her behalf, this will not be allowed to defeat estates over depending upon estates given her in the will. *Wilson v. Stafford*, 1 Winst. Eq. 103.

²⁹ *Doe d. Harris v. Howell*, 10 B. & Cr. 191. But it is said (1 Jarman, 831, ed. 1861, by the editors) "that a limitation which has once operated as a contingent remainder can never, after the death of the testator, be changed into an executory devise." But unless the operation of the will has been fixed by judicial construction, at some prior period, in such a manner as to bind the

20. An estate may be so framed as to take effect in one event as a contingent remainder, and in another as an executory devise ingrafted on an alternative contingent remainder in fee.⁸⁰

* 270 The * case of *Doe d. v. Selby*⁸¹ is sometimes quoted as an illustration of this rule, but it is not strictly of that character, but well calculated to illustrate the point. The precise point stated above is thus illustrated by Mr. Jarman: I devise to A. for life, and, if he shall die on the first of January, then, from one year afterwards, to B. in fee. But if A. shall die on any other day, then, immediately from the decease of A., to B. in fee. In the first event the limitation to B. takes effect as an executory devise, and in the second as a contingent remainder, so that his interest would be destructible or not by the fact of A. dying according to the one or other event.⁸²

21. It has been made a question how far an executory devise, to arise out of a contingent remainder, will fail in consequence of the failure or destruction of the estate out of which it was to arise.⁸³ And it seems to be conceded that it will not, so far as a general rule, and never, unless its essence were derived out of the estate, after which it is provided to take effect, in which case it evidently would fall with the estate, which could alone give it birth.⁸³

22. Where both the executory devise and the contingent remainder in fee, upon failure of which the executory devise was to take effect, become vested in the same person, they do not merge, but remain distinct; and the executory devise will pass to the heirs upon the failure of the remainder upon which it depended. Thus, where the testator gave his real and personal estate to his wife, in trust for the maintenance and education of his daughter till she

parties, we see no good reason to interpose any such technical rule in the way of doing justice. 1 Jarman (ed. 1861), 524, 525.

⁸⁰ 1 Jarman, 831.

⁸¹ 4 Dow. & R. 608; s. c. 2 B. & Cr. 926.

⁸² 1 Jarman, 831.

⁸³ 1 Jarman, 833. See also *Fearne Cont. Rem.* 418, 423. And where an estate has been defeated, as a contingent remainder, by the failure of the intermediate estate, it may be allowed to operate by way of executory devise, in order to effectuate the intention of the testator. *Thompson v. Hoop*, 6 Ohio, N. S. 480. Thus, where the testator devised his plantation to his wife for life, remainder to his son, and the wife renounced the will, the estate over was allowed to take effect as an executory devise. *Id.*, ante, § 16, pl. 66.

arrived at the age of twenty-one, and, in case of her death before that time, to the wife in fee, it was held that the mother took an executory devise in fee, which, in the event of her dying before the daughter, would descend to the daughter, who was already seized of a defeasible estate in fee, contingent upon her dying before the age of twenty-one; but that the two estates will not merge,

* so that, in the event of the daughter dying before she came * 271 of age, the executory devise in fee will pass to her heirs.⁸⁴

23. An immediate estate in fee, defeasible upon the taking effect of an executory devise over, has nevertheless, during its continuance, all the incidents of an absolute estate in fee-simple, such as dower, curtesy, &c., the devisee holding the estate in fee subject only to a possibility.⁸⁵ But there are some exceptions to this rule as to estates by curtesy, as where the executory devise over is in favor of the children of the wife, and consequently such children are not capable of inheriting the estate, which is indispensable to an estate by curtesy, the children taking the estate by purchase through the operation of the executory devise, and not by descent.⁸⁶ The rule is the same in regard to dower, and with the same exceptions, it being equally requisite, in regard to this species of estate, as of the former, that the children of the marriage should be capable of inheriting the property.⁸⁷

24. There can be no remainder created in real and personal chattels. Every estate, therefore, in personal property, which is provided to take effect in futuro, whether preceded by a prior estate in some other one or not, must be created by way of executory devise.⁸⁸ It is in this way that a bequest of a term for years, after an estate for life, is made to take effect.⁸⁹ And it is now

⁸⁴ *Goodtitle d. Vincent v. White*, 15 East, 174; *Same v. Same*, 2 B. & P. New Rep. 383; *Goodright v. Searle*, 2 Wils. 29; *Doe d. Andrew v. Hutton*, 3 B. & P. 643.

⁸⁵ 1 Jarman, 833; *Buckworth v. Thirkell*, 3 B. & P. 652, in n. So an equitable fee passes the same incidents, and the title may pass under the statute of uses. *Richardson v. Stodder*, 100 Mass. 528.

⁸⁶ *Sumner v. Partridge*, 2 Atk. 47; *Barker v. Barker*, 2 Sim. 249. See *Burke v. Valentine*, 52 Barb. 412.

⁸⁷ *Moody v. King*, 2 Bing. 447; *Goodenough v. Goodenough*, 3 Pres. Abst. 372; *Smith v. Spencer*, 2 Jur. N. s. 778; 1 Jarman, 833.

⁸⁸ 1 Jarman, 834.

⁸⁹ *Horton v. Horton*, Cro. Jac. 74; *Woodcock v. Woodcock*, Cro. Eliz. 795. It was formerly contended that a bequest of any chattel estate for life carried

clear that personal property may be subjected to the same modifications of ownership as real estate, by way of executory devise.⁴⁰

* 272 * 25. As already stated, courts of equity will lend their aid, during the continuance of an intermediate estate in chattels, in favor of the party entitled in remainder, by requiring

the whole estate; but it was finally held that the estate in remainder might take effect as an executory devise. *Manning's Case*, 8 Co. Rep. 94 b; *Doswell v. Earle*, 12 Vesey, 473; *Theobalds v. Duffoy*, 9 Mod. 102; *Mallet v. Sackford*, 8 Vin. Ab. 89, pl. 5; *Lampet's Case*, 10 Co. Rep. 46 b; *Roe d. Bendale v. Summerset*, 5 Burr. 2608.

⁴⁰ *Martin v. Long*, 2 Vern. 151; *Johnson v. Castle*, 8 Vin. Ab. 104, pl. 2; *Hoare v. Parker*, 2 T. R. 376. This rule is clearly established in most of the American states. 2 Kent, Comm. 352, 353; *Moffat v. Strong*, 10 Johns. 12; *Westcott v. Cady*, 5 Johns. Ch. 334; *Griggs v. Dodge*, 2 Day, 28; *Taber v. Packwood*, id. 52; *Scott v. Price*, 2 S. & R. 59; *Deihl v. King*, 6 id. 29; *Rogers v. Ross*, 4 Johns. Ch. 388; *Kelso v. Dickey*, 7 W. & S. 279; *Marston v. Carter*, 12 N. H. 159; *Robards v. Jones*, 4 Ired. Law, 53; *French v. Hatch*, 8 Fost. 331; *Ladd v. Harvey*, 1 Fost. 514. A bequest of money for life, and then over, gives only the interest to the first taker. *Field v. Hitchcock*, 17 Pick. 182; *Betty v. Moore*, 1 Dana, 235; *Rathbone v. Dyckman*, 3 Paige, 9; *Jones v. Sothoron*, 10 Gill & J. 187; *Dashiell v. Dashiell*, 2 Har. & Gill, 127; *Homer v. Shelton*, 2 Met. 194. And where the estate over is made dependent upon the death or marriage of the first taker, and she marries during the life of the testator, but without his knowledge, the estate over takes effect immediately on the death of the testator. *Bullock v. Bennett*, 31 Eng. L. & Eq. 463. Distinction between income and capital. *Kinmonth v. Brigham*, 5 Allen, 270; *Reed v. Head*, 6 Allen, 174.

A remainder in lands devised to sons of the tenant for life will vest at the decease of the testator in the class as then existing. *Dingley v. Dingley*, 5 Mass. 535. But in case of the birth of other children thereafter, it will have the effect to open the vesting, and admit the after-born children. But this latter rule will not apply to the devise of chattels. *Id. Per Parsons*, Ch. J. The rule laid down in the text is fully maintained in *Shelley v. Shelley*, Law Rep. 6 Eq. 540. And an executory devise over was made to take effect in the case of a married woman the same as if she had been single at the date of the will, it appearing the testator then supposed her husband to have been long dead. *Crosthwaite v. Dean*, Law R. 5 Eq. 245. Where the testator gave all his personalty to his widow for the maintenance of herself and son while she remained unmarried, it was held that she took the same in trust for that period for the purpose named, and the remainder must be regarded as intestate estate. *Loring v. Loring*, 100 Mass. 340. But the courts incline to construe bequests of personalty as carrying the entire interest. *Reformed Church v. Disbrow*, 52 Penn. St. 219.

the party holding the present interest to furnish an inventory.⁴¹ And after the * termination of the prior estates, * 273 equity will decree a specific surrender of the particular chat-

⁴¹ *Foley v. Burnell*, 1 Br. C. C. 274 ; 1 Jarman, 835 ; ante, § 7, pl. 32 et seq. See also *Martelli v. Holloway*, L. R. 5 Ho. Lds. 532. In *Burnett v. Lester*, 53 Ill. 325, the tenant for life was required to furnish security that the estate should not be wasted or misapplied. And in *Jones v. Stites*, 4 C. E. Green, 324, it is said that where the residuum of the estate is bequeathed for life, and then over, it should be converted into money and invested in the name of the executor, and only the income go to the tenant for life. The general subject of such bequests is here somewhat discussed. And where trust-funds, of which the income for life is given to one and the remainder to another, are invested, either by the testator in his lifetime or by the trustee after his death, in shares of a joint-stock company, the value of which consists in part of an accumulated surplus of undivided earnings, this must be treated as capital, and only the increase upon the whole go to the tenant for life. But an extra dividend declared from earnings of the company must go to the tenant for life, unless part of it had been carried to the account of accumulated profits before the death of testator, or at the time of investment. *Van Doren v. Olden*, 4 C. E. Green, 176. In some cases, where from the terms of the will it is apparent the testator intended the first taker should receive a certain sum annually, the courts have allowed any unexpected deficiency to be made up from the corpus of the fund, although the testator probably expected the income would have been sufficient. For in such cases the primary intent of the will is commonly the more important and prevailing one in the mind of the testator. *Birch v. Sherratt*, Law Rep. 2 Ch. App. 644, reversing s. c. Law Rep. 4 Eq. 58.

Where the income of the residue of the estate is given to one for life, remainder to another, the tenant for life is entitled to the income in specie of such of the estate as is invested, from the death of the testator, after the payment of debts and legacies, and to the income of so much consols as the portion of the estate not invested will produce by conversion at the death of testator, and to the income of any fund reserved for the payment of contingent legacies until the contingency occurs. *Allhusen v. Whittell*, Law Rep. 4 Eq. 295. But where the testator gave all his property, real and personal, to his wife during life, and the power to dispose of the same by will without limitation, but providing that certain special legacies made by him should be paid out of the residue of the estate, not expended by her during her life, or a ratable proportion of the same, if there should not remain sufficient to pay the whole amount of the legacies, it was held to give her the absolute property in all the estate except the "special" legacies and a life-estate in them.

Any amount paid on compromise, less than the whole debt, must be treated as so much saved to the estate, and apportioned to capital and income, the same as if a fund adequate to produce it had been invested at the decease of testator. *Maclaren v. Stainton*, Law Rep. 4 Eq. 448. The subject of the proper distribution between income and capital is considerably discussed in the late case of *Brown v. Gellatly*, Law Rep. 2 Ch. App. 751.

tels, where they are of such a nature that the loss cannot be compensated in damages, as family plate, pictures, &c.⁴²

26. In *Foley v. Burnell*,⁴¹ Lord *Thurlow* discusses the question of the rights of a tenant for life of personal chattels, such as plate, which is bequeathed with a house, as an heirloom, to be used by the successive occupants of the house, and which, being removed to town, was levied upon by the creditors of one of the successive tenants for life, whose estate was then in being; and his lordship also here considers the question of the rights of creditors. It is said that the old rule of requiring security from the tenant for life is abolished; and to this effect are all the later cases. It is here laid down as clear law, that, where the bequest is in trust for the use of another, the creditors of the cestui que use can acquire no interest.⁴³ And if they may take the use of a tenant for

* 274 life where * no trustee is interposed, it is only for the term of the debtor; and in the mean time such creditor becomes a trustee for him entitled in remainder.⁴⁴ Lord *Thurlow* here said, upon the proposition that the creditor ought not to be allowed to sell: "I had gone the length of persuading myself that this was the justice of the case, upon the authority of *Trafford v. Trafford*." ⁴⁵

⁴² *Pusey v. Pusey*, 1 Vern. 273; *Somerset v. Cookson*, 3 P. Wms. 389; *Fells v. Read*, 3 Vesey, 70; *Lloyd v. Loaring*, 6 Vesey, 773; *Lowther v. Lowther*, 13 Vesey, 95; *Earl of Macclesfield v. Davis*, 3 V. & B. 16.

⁴³ *Earl of Shaftesbury v. Russell*, 1 B. & Cr. 666; *Cadogan v. Kennett*, 2 Cowp. 432.

⁴⁴ 1 Jarman, 835. After the expiration of the debtor's term, the creditor is liable in trover for the chattels, unless he surrender them in good condition.

⁴⁵ 3 Atk. 347. Some of the American states have required the tenant for life of chattels to give security for the preservation of the estate where there is danger that the property will be either wasted, secreted, or removed. *Langworthy v. Chadwick*, 13 Conn. 42, 46; *Hudson v. Wadsworth*, 8 Conn. 348. And the same rule is maintained in *Bullock v. Seymour*, 33 id. 289; *Clarke v. Terry*, 34 id. 176. The same rule was followed in *Homer v. Shelton*, 2 Met. 194, 205, 206; *Mortimer v. Moffatt*, 4 Hen. & Munf. 503; *Gardner v. Harden*, 2 McCord, Eq. 32; *Smith v. Daniel*, id. 143; *Merril v. Johnson*, 1 Yerg. 71; *Henderson v. Vault*, 10 Yerg. 30; *Evans v. Iglehart*, 6 Gill & J. 171; *Covenhoven v. Shuler*, 2 Paige, 122, 123; *Sutton v. Craddock*, 1 Ired. Eq. 134; *French v. Hatch*, 8 Fost. 331. And in a case in Pennsylvania (*Bedford's Appeal*, 40 Penn. St. 18, 23), it is treated as the settled practice of the courts of that state for the Orphans' Court to direct the tenant for life of personalty to give such security to the executor, upon receiving the property, "as in the judgment of that court shall sufficiently secure the interests" of those entitled in remainder. The statute of this state prohibits the payment to the primary

27. As personal estate is allowed to be held by successive owners, it is liable to all the objections against perpetuities.⁴⁶

28. If personal chattels are of a perishable character, it was long doubted what would be the effect of limiting successive estates in them. But in *Randall v. Russell*, Sir *William Grant*, M. R., said : " There cannot be a limitation over after a life-interest in such articles." But it is here held that if such estates be created in such property, included in a residuary bequest, it must be converted into money and invested for the benefit of the estate in remainder, and only the interest enjoyed by the tenant for life.⁴⁷

* 29. The subject of executory devises has been consid- * 275
erably discussed in many of the American states, and the rules of the English law have been universally followed, or intended to be, so far as we know ; and where that has not been the case, either from statutory provisions or local usage, or from construction of the particular devise, such cases will not be regarded as of authority beyond the particular jurisdiction. The distinction

legatee without security. But this statute does not extend to a case where the bequest is of a sum of money, " both principal and interest (if she needs it), during her lifetime ; after which it is to be disposed of in like manner as the residue of my estate." *Green's Appeal*, 42 Penn. St. 25.

⁴⁶ 1 Jarman, 835.

⁴⁷ Ante, § 7, pl. 28, 29; *Randall v. Russell*, 3 Mer. 190, 194, 195. See also *Andrew v. Andrew*, 1 Coll. C. C. 686; *Bryant v. Easterson*, 5 Jur. N. S. 166. The rule has been sometimes questioned. *Porter v. Tournay*, 3 Vesey, 311. And it has been held not applicable to farming tools. *Groves v. Wright*, 2 Kay & J. 347. Nor to wearing-apparel. *Hall's Will*, 1 Jur. N. S. 974. The same rule prevails in some of the American states. *Evans v. Iglehart*, 6 Gill & J. 171; *Henderson v. Vaulx*, 10 Yerg. 30; *Merrill v. Emery*, 10 Pick. 507; *German v. German*, 27 Penn. St. 116. If not specifically given, but generally, as goods and chattels, the tenant for life is bound to convert them into money, and save the principal for the one entitled in remainder. *Patterson v. Devlin*, 1 McM. (Eq.) 459. And the same rule is applied to leaseholds, which are constantly deteriorating in value as the term advances. The whole must be converted into money at the death of the testator, and the tenant for life receive the income of the proceeds, and the corpus go to the one entitled in remainder. *Alcock v. Sloper*, 2 My. & K. 699. In *Rowe v. White*, 1 C. E. Green, 411, it is said the tenant for life may be required to furnish security, at the instance of those interested, where there is serious danger of loss. See also *Howard v. Howard*, id. 486. The fact that the tenant for life has power by the will to dispose of the bequest, and convert the same into money, will not be construed to enlarge the estate for life into an absolute property. *Rose v. Rowe*, 17 W. R. 1077.

between estates in remainder and by way of executory devise is very clearly pointed out by *Shaw*, Ch. J., in *Nightingale v. Burrell*,⁴⁸ and in full coincidence with what we have before stated. The question is again discussed by the court, *Bigelow*, J., in *Hall v. Priest*,⁴⁹ with similar results.

30. The question of remoteness in an executory devise is learnedly and lucidly discussed by the judge last named, in the case of *The Church in Brattle Square v. Grant*,⁵⁰ and the conclusion arrived at, that where the limitation by way of executory devise is such that it may possibly not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years (adding in case of a child then in ventre sa mère the usual fraction of a year) afterwards, is void, as too remote, and

* 276 * tending to create a perpetuity; and that in such case, the limitation over being void for remoteness, the estate vests absolutely in the first taker.

31. It is clear that an executory devise, to take effect after the indefinite failure of issue, is void for remoteness; and hence courts are astute, sometimes, to devise some construction which shall restrain the failure of issue to the term of limitation allowed.⁵¹

* 277 * But an executory devise over, upon the decease

⁴⁸ 15 Pick. 104, 110. The important practical distinction between these two species of estates, that a contingent remainder is barred by a common recovery, or, in Massachusetts and some other states, by a conveyance by deed, and that an executory devise is not so barred, is here clearly presented.

⁴⁹ 6 Gray, 18, 20, 21.

⁵⁰ 3 Gray, 142. See also the opinion of *Wilde*, J., in *Holm v. Low*, 4 Met. 190; *Ferson v. Dodge*, 23 Pick. 287; *Ide v. Ide*, 5 Mass. 500, 502; *Annable v. Patch*, 3 Pick. 360.

⁵¹ *Randolph v. Wendel*, 4 Sneed, 646; *Bramlet v. Bates*, 1 Sneed, 554; *Tongue v. Nutwell*, 13 Md. 415; *Black v. McAulay*, 5 Jones, Law, 375; *Jordan v. Roach*, 32 Miss. 481. The question of remoteness is here discussed somewhat upon general principles. See also *Gray v. Bridgeforth*, 33 Miss. 312; *Chism v. Williams*, 29 Mo. 288; *Jones v. Miller*, 13 Ind. 337; *Jackson v. Billinger*, 18 Johns. 368; *Miller v. Macomb*, 26 Wend. 229, affirming s. c. 9 Paige, 265. The reason of the rule stated in the text, viz., that, as an indefinite failure of issue may not occur within the allowed limitation of an executory devise, it is therefore void, is discussed in several New York cases. 2 *Abbott's Dig. Tit. Devise*, pl. 164, 166; *Van Vechten v. Pearson*, 5 Paige, 512; *Van Vechten v. Van Veghten*, 8 Paige, 104; *Lorillard v. Coster*, 5 id. 172; *Hawley v. James*, id. 318; s. c. 16 Wend. 61; *Hone v. Van Schaick*, 20 Wend. 564; *Fisk v. Keene*, 35 Me. 349; s. p. *Boehm v. Clarke*, 9 Vesey, 580. But where the estate over is made dependent upon the first taker mar-

of the tenant for life, without issue living at the time of his death, is good.⁵² And it is not allowable to make an executory

rying and having children, when that event occurs, the interest vests, and cannot afterwards be defeated by more remote contingencies. *Bell v. Phyn*, 7 Vesey, 453. So also when made dependent upon marriage or attaining the age of twenty-one. *Thackeray v. Hampson*, 2 Sim. & Stu. 214. See also *Cross v. Cross*, 7 Sim. 201. But if the term may be extended beyond the legal limit, the estate over is void. *Dodd v. Wake*, 8 Sim. 615. But any limitation to take effect during the continuance of ever so many lives in existence at the decease of testator is valid. *Trafford v. Boehm*, 3 Atk. 440, 449; s. p. *Ellicombe v. Gompertz*, 3 M. & Cr. 127; *Murray v. Addenbrook*, 4 Russ. 407. But if the estate be attempted to be extended to a succession of lives of different generations, it is void beyond the first of course. *Hayes v. Hayes*, id. 311; *Dawson v. Small*, L. R. 9 Ch. App. 651. But estates may be limited, over any order of succession and to any extent, among those in existence at the death of testator. *Bradshaw v. Skilbeck*, 2 Bing. N. C. 182. But an estate made by appointment under a power is not affected by the fact that the power was broad enough to have created an estate void for remoteness, provided it was not so exercised. *Slark v. Dakyns*, L. R. 10 Ch. App. 35; *Phipson v. Turner*, 9 Sim. 227.

And in a case in Pennsylvania, *Bedford's Appeal*, 40 Penn. St. 18, the question of bequests over upon the indefinite failure of issue is discussed, and it is said that "slight circumstances are laid hold of, as sufficient to indicate an intention that a limitation over on death without issue shall take effect at a definite time; to wit, on the death of the first taker. This distinction is as firmly maintained in this state as in England, and it is a distinction, the object of which is to effect the testator's purpose. *Deihl v. King*, 6 S. & R. 29; *Eichelberger v. Barnetz*, 17 id. 293. It has often been held that a limitation over by will to survivors or persons in being after the death of the first taker without issue raises a strong presumption that the testator did not contemplate an indefinite failure of issue. *Johnson v. Currin*, 10 Penn. St. 498; *Budd v. State*, 22 Md. 48, 57. It was held in this case, that although the language of the will is such as to compel the court in following the former cases to hold that a bequest of real estate is void for remoteness, if made dependent upon the indefinite failure of issue, it will not give the same construction to a bequest of personalty in the same words, but will restrict it to the failure of issue living at the death of the first taker, and thus save the forfeiture for remoteness. But it would seem more reasonable to apply the same rule of construction to both real and personal estate in such a case. See *Heasman v. Pearse*, L. R. 7 Ch. App. 275, where it was held that a limitation after an estate tail is not void for remoteness, because the tenant in tail may always terminate the estate; but that, where a will contains a provision offending against the law as to perpetuities, it cannot on that account be rejected, but must be considered as part of the will, and allowed its proper weight in fixing the construction.

⁵² *Bradhurst v. Bradhurst*, 1 Paige, 331; *Rathbone v. Dyckman*, 3 Paige, 9;

devise dependent upon an indefinite failure of issue in an estate tail.⁵³

32. The general rule that executory devises may be made to take effect in futuro, without an intermediate estate to uphold them, is recognized in most of the American states, the fee in the mean time remaining in the heir of the devisor.⁵⁴ If there is any thing in the devise to show that it was not intended to take effect in presenti, and it comes within the legal limits as to remoteness, it may take effect as an executory devise.⁵⁵

33. It is a settled rule of American as well as English law, that where the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, any
 * 278 estate * over is void, as being inconsistent with the first gift.⁵⁶ Thus a devise to the testator's son P. of certain real and personal estate, and to his heirs and assigns for ever, adding,

Heard v. Horton, 1 Denio, 165. See also *Hill v. Hill*, 4 Barb. 419. This and the affiliated questions upon the subject of executory devises are very extensively discussed in *Miller v. Emans*, 19 N. Y. 384, and the rule of the text vindicated. See also *Chrystie v. Phyfe*, id. 344; *Norris v. Johnston*, 17 Gratt. 8; *Clarkson v. Booth*, id. 490; *Tebbs v. Duval*, id. 349. And the rule laid down in the text and in note 52 is established by statute in Mississippi. *Sims v. Conger*, 39 Miss. 231. See *Allender v. Sussan*, 33 Md. 11; *Brattleboro v. Mead*, 43 Vt. 556.

⁵³ See chapter on Perpetuities, post, § 36.

⁵⁴ *Nightingale v. Burrell*, 15 Pick. 104, 111; *Miller v. Chittenden*, 4 Iowa, 252.

⁵⁵ *Miller v. Chittenden*, 4 Iowa, 252. The doctrine of contingent remainders is upheld in *Riggs v. Sally*, 3 Shep. 408. So also that of executory devises in *Chambers v. Wilson*, 2 Watts, 495, and also in *Jackson v. Kip*, 2 Paine, C. C. 366. The rules of the English law, both as to vested and contingent remainders, are applied in *Pierce v. Hakes*, 23 Penn. St. 231. The rules of law applicable to executory devises and contingent remainders, as well as the effect of statutes converting estates in tail into estates in fee-simple, are all involved in *Lion v. Burtiss*, 20 Johns. 483. The distinction between executory devises and contingent remainders is discussed and maintained in *Downing v. Wherrin*, 19 N. H. 9. Construction adopted with the view to prevent the failure of devise for remoteness. *Gee v. Liddell*, 12 Jur. n. s. 541; s. c. Law Rep. 2 Eq. 341, and 14 W. R. 853.

⁵⁶ *Ide v. Ide*, 5 Mass. 500. But a contingent executory devise in remainder may be limited upon a fee-simple; and, after the estate over becomes impossible, the fee will remain absolute. *Brightman v. Brightman*, 108 Mass. 238. See also *Burleigh v. Clough*, 52 N. H. 267; *Yarnall's Appeal*, 70 Penn. St. 335.

that if P. should die, and leave no lawful heirs, what estate he should leave to be equally divided between another son and a grandson of the testator, naming them, it was held the devise over was void, as being inconsistent with the absolute interest in the first devisee.⁵⁶ This exclusion of the devise over depends upon whether the first taker has the absolute right to dispose of the property.⁵⁷

34. But if the first devise lapses by the death of the devisee in the lifetime of the testator, the devise over will take effect, notwithstanding it would have been defeated by the absolute character of the intermediate estate, if that had taken effect.⁵⁸

35. In those states where entails have been abolished by statute, and a provision to convert them into fees-simple, a devise which will under the English law create a fee-tail, either absolute or contingent, will create an absolute fee-simple.⁵⁹

36. Where a contingent remainder is given to the trustees of a seminary, who at the death of the testator had no power to take, but acquired such power before the termination of the intermediate estate, it was held that the estate in remainder wholly failed as to the trustees, and went to the heirs of the deviser.⁶⁰

37. Trusts for accumulation of the income of an estate during the minority or respective minorities of any tenant for life or in tail in possession, under a trust of a term for a thousand years, created by settlement, were held void, except for the payment of debts.⁶¹ And a direction that chattels should go as heirlooms, as far as the rules of law or equity will allow, was held to vest an absolute estate in the first taker.⁶²

* 38. Where a devise over is given upon the decease of the first taker without children, it has been held to import children living at the death of the parent.⁶³ And such bequests are

⁵⁷ *Shepley, J.*, in *Ramsdell v. Ramsdell*, 21 Me. 288, 293. See also *Attorney-General v. Hall*, Fitzg. 314; *Timewell v. Perkins*, 2 Atk. 102; *Burbank v. Whitney*, 24 Pick. 146; *Jackson v. Coleman*, 2 Johns. 391; *Same v. Bull*, 10 Johns. 19; *Same v. Robins*, 15 Johns. 169; *Melson v. Cooper*, 4 Leigh, 408; *Barnard v. Bailey*, 2 Harring. 56; *Jackson v. Delancy*, 13 Johns. 537.

⁵⁸ *Burbank v. Whitney*, 24 Pick. 146. See ante, § 8, pl. 15, and cases cited.

⁵⁹ *Bramble v. Billups*, 4 Leigh, 90.

⁶⁰ *Leslie v. Marshall*, 31 Barb. 560.

⁶¹ *Southampton v. Hertford*, 2 V. & B. 54.

⁶² *Vaughan v. Burslem*, 3 Br. C. C. 101; *s. p. Mackworth v. Hinxman*, 2 Keen, 658.

⁶³ *Hughes v. Sayer*, 1 P. Wms. 534; *s. p. Doe v. Knowls*, 1 B. & Ad. 324; *Gawler v. Cadby*, 1 Jacob, 346; *Barker v. Cocks*, 6 Beav. 82; *Sheppard v. Les-*

upheld as good executory devises.⁶⁴ But in many very similar cases, the estate, being personalty, is held to vest absolutely in the first taker upon having children, whether surviving or not.⁶⁵ And it seems to be settled by the English courts, that a bequest over on the decease of the tenant for life "leaving no issue" imports "having had no issue." This was so held in the recent case of *Treharne v. Layton*. (a)

39. In New York, where estates to take effect in future are limited to two lives, it has been held that where the purposes of a trust are separable, and some of these must arrive before the expiration of two lives, and others not until after the expiration of that period, the former may be sustained, and the others fall.⁶⁶

40. Where the testator devised the body of his estate to his daughter and the heirs of her body, and, in the event of her dying without heirs of the body, directed that the whole property should be converted into money, and applied to certain vested charities, this latter provision was held to embrace the entire corpus of the estate, but no portion of the income accruing during the life of the tenant in tail, that having vested absolutely in such tenant.⁶⁷

41. Where a devise is made of real and personal estate to several, in fee, as tenants in common, with a limitation over in the event of all dying under age without issue, this will give an absolute property in personalty, and the realty will vest in the legal representatives of each upon his death, subject to be divested upon all dying as provided.⁶⁸

singham, Amb. 122; *Massenburgh v. Ash*, 1 Vern. 304; *Pawlet v. Dogget*, 2 id. 86; *Jarman v. Vye*, Law Rep. 2 Eq. 784. And where the devise over is given upon the first devisee "dying before twenty-one, leaving no issue then living," it was held that both alternatives must concur in order to have the estate over take effect. *Harkness v. Corning*, 24 Ohio St. 416.

⁶⁴ *Stone v. Maule*, 2 Sim. 490; *Stonor v. Curwen*, 5 Sim. 264; *Keily v. Fowler*, 3 Br. P. C. 299; *Mansell v. Grove*, 2 Yo. & Coll. C. C. 484; *Wilkinson v. South*, 7 T. R. 555.

⁶⁵ *Weakley v. Rugg*, 7 T. R. 322.

(a) 33 Law Times, n. s. 327. See also *Ex parte Hooper*, 1 Drewry, 264; *White v. Hill*, L. R. 4 Eq. 265; *Bryden v. Willett*, 7 id. 472; *Maitland v. Charlie*, 6 Madd. 243; *Re Thompson's Trusts*, 5 DeG. & Sm. 667.

⁶⁶ *Post v. Hover*, 33 N. Y. 593. See also *Merrick's Trusts*, Law Rep. 1 Eq. 551.

⁶⁷ *Williams v. Pearson*, 38 Ala. 299. See also *Ewin v. Park*, 3 Head, 713; *Johnson's Trusts*, Law Rep. 2 Eq. 716.

⁶⁸ *Fenby v. Johnson*, 21 Md. 117.

42. Where the estate is devised to the father, upon condition that he shall pay his son a gross sum at the age of twenty-one, but if he die before that age, without leaving heir or heirs of his body who shall attain to the age of twenty-one years, then said estate shall go to the remainder of the first devisee's children which * shall be then living, and providing also that the * 280 estate shall be bound for the payment of the sum so charged upon it, to all interested in such payment, it was held to create an estate in fee, both in the first devisee and those entitled in remainder.⁶⁹

43. Upon a bequest of an annuity to one son (a lunatic) and a legacy to each son, and a direction that the residuary estate should be invested in stock, and the income divided, half-yearly, among "my four sons above named," and upon the decease of either, without lawful issue, such share to revert to the remainder then living, their child or children, it was held that the four sons only were entitled to any thing beyond the annuity, and that they took only for life, with an estate in remainder by implication to their children living at their death.⁷⁰

44. On a devise to trustees of both real and personal estate, for the use of the testator's nephew for life, with remainder to the first and other sons of each nephew in tail, and providing that the personal estate shall not vest absolutely in any tenant in tail who shall die under twenty-one years, it was held, that the gift of the personalty was not void for remoteness, as a gift to the tenant in tail who should attain twenty-one, but was a gift to the first tenant in tail, who took by purchase, and that therefore the son of the first taker took an absolute estate in the personalty, liable to be divested on his dying before twenty-one.⁷¹

45. In Connecticut, an estate tail becomes a fee-simple in the second tenant in tail. It was therefore held in that state, that upon a devise to A. and his heirs for ever, but if he should die without leaving children, or the legal representatives of deceased children, then to testator's heirs, A. took an estate in fee-simple, defeasible in the event of his dying without leaving children, &c.,

⁶⁹ *Doe v. Dill*, 1 *Houst.* 398.

⁷⁰ *Dowling v. Dowling*, *Law Rep.* 1 *Eq.* 442.

⁷¹ *Christie v. Gosling*, *Law Rep.* 1 *Ho. Lds.* 279.

as stated in the will; but that on his marriage and the birth of issue this estate became absolute and indefeasible in the first taker.⁷²

* 281 * SECTION III.

DEVISES AND LEGACIES UPON CONDITION.

1. Definition of conditional bequest.
2. Conditions are precedent and subsequent.
3. Where condition is in the nature of a consideration, it is held precedent.
4. Estates dependent upon marriage held upon precedent conditions.
5. Where condition depends upon time, the day of the decease is excluded.
6. Conditions that devisee do a particular act, or abstain, held precedent.
7. The American cases maintain the same distinctions. All the particulars to be performed.
8. Conditions precedent, which fail of performance, defeat the estate.
9. But conditions subsequent, becoming impossible or illegal, do not defeat the estate.
10. And, where the estate over depends upon a condition precedent which fails, that estate fails.
11. But conditions subsequent failing do not always defeat the estate over.
12. Where the estate is personal, no distinction between conditions precedent and subsequent.
13. Conditions repugnant to the estate are void.
14. Devises in fee incumbered by conditions against alienation or use of the estate.
15. Distinction between arbitrary restrictions and those for the benefit of particular persons.
16. Bequests of personalty affected the same as those of realty, by conditions against use or alienation.
17. Bequests with a provision against the claim of creditors not favored.
 - (1.) Property cannot be given absolutely, or for life, without the power of alienation.
 - (2.) An estate may be so framed as to cease upon a particular event, whether given over to others or not.
 - (3.) Important distinction between an estate to cease upon bankruptcy and a condition against alienation.
 - (4.) So also between voluntary alienation and by act of law.
18. But the limitation of an estate bequeathed must be clearly expressed, or the courts will construe it a condition.

⁷² *Bullock v. Seymour*, 33 Conn. 289. See also *Goldsby v. Goldsby*, 38 Ala. 404; *Sherrod v. Sherrod*, id. 537. Such a devise as named in the text is always held good to children living at the death of the first taker. *Lippett v. Hopkins*, 1 Gallison, 454; *Hoxton v. Gardiner*, 1 Har. & McH. 437.

19. There is no doubt property may be bequeathed for the sole use of the donee, so that creditors shall have no benefit from it.
20. One properly interested in the person may annex any reasonable condition to the gift of property to such person, although operating in restraint of marriage.
- n. 36. Great conflict in the cases. Lord *Loughborough's* commentary upon them.
21. Such conditions operate differently, whether the property is real or personal.
22. Enumeration of cases where conditions in restraint of marriage held reasonable.
23. Eminent writers and judges question whether the refinements on this subject will be followed.
24. Such conditions subsequent not valid. Dispensing with consent does not with marriage.
- * 25. Residuary clause not equivalent to bequest over, unless provided to * 282 fall into residuum.
26. Such marriage with consent may not refer to first marriage, but commonly does.
27. Consent of all required, unless they have refused to act, or have deceased.
28. Late cases stated. Conditions tending to separation between husband and wife void.
29. Any condition restraining testator's widow from marriage valid.
30. Statement of what conditions restraining marriage are valid.
31. Exposition of the doctrine of in terrorem conditions by Lord *Cranworth*. Synopsis of the general rules deducible from the cases.
32. Where the donee is required to assume a new name, it may be done by reputation.
33. Residence in a particular house satisfied by such residence as the creation of domicile requires.
34. Conditions against disputing will valid, but English cases in confusion.
35. American cases not so numerous, and mere repetitions of the English cases.
36. The character of conditions determined by the general intent of testator.
37. The American cases hold any restraint upon the use or alienation of the estate void.
38. It is easy so to frame a declaration of trust, as not to allow the first donee the power of alienation.
39. An absolute condition against alienation void, but may be rendered valid through the agency of a trust. Other illustrations.
40. Conditions in a devise become binding upon devisee by acceptance.
41. Decision of New York Court of Appeals upholding a trust for exclusive personal use. Subject further discussed.
42. Condition in restraint of marriage void, being no valid gift over.
43. Conditions in the will embrace those in an after-codicil.
44. Restrictions against alienation limited to first donee, unless otherwise expressed.
45. Condition for good behavior of devisee, if intelligible, is valid.
46. Words importing present interest in donee render all conditions subsequent.
47. The words must control conditional limitations.
48. Devises of realty on conditions in restraint of marriage valid, but not as to personalty.
49. The legatee upon condition is not bound to elect to accept the legacy until he has had full opportunity to know its burdens.

50. The question of the responsibility incurred by accepting conditional legacy further discussed.
51. Where testator prevents performance of condition subsequent, legacy takes effect.
52. Bequest upon condition of repairing tomb, means from the time bequest becomes operative.
53. Acts done by others, without the knowledge of devisee, will not affect the performance of conditions.
54. Conditions against alienation affected by bankruptcy, creating judgment liens, and marriage.
55. A condition that an immediate bequest shall go over, if the legatee shall die before actual receipt of it, is void.
56. Condition of bequest as to real estate contracted to be conveyed, but price not fully paid.
57. Illustration of the failure of condition subsequent by act of testator.
58. Bequests upon condition of being claimed by the legatee within a limited time after testator's decease.

* 283 * § 18. 1. A CONDITIONAL bequest is where its taking effect or continuing in operation depends upon the happening or not happening of some uncertain event.¹

2. Conditions in wills are either precedent or subsequent; that is, the performance of the condition is required before the estate can vest, or the failure to perform the condition will divest the estate.² The distinction between these two classes of conditions is well enough understood by the profession; and still it is not always easy, in practice, to determine with certainty whether a condition was intended to limit the acquisition or the retention of the estate.³

3. It seems to be agreed, that in regard to all conditions, whether in a deed or will or in simple contracts, where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent.⁴

4. So the devise of an estate, upon condition of marrying into a particular family, is a condition precedent, and no estate vests until such marriage takes effect. But the devisee has his whole

¹ 2 Wms. Ex'rs, 1132; 1 Roper, 645.

² 2 Jarman (ed. 1861), 1, 2.

³ *Willes*, Ch. J., in *Acherley v. Vernon*, *Willes*, 153, where the early cases are cited and commented upon.

⁴ *Acherley v. Vernon*, *Willes*, 153, and cases there cited; *Large v. Cheshire*, 1 Vent. 147.

life to perform the condition, and the fact of having married contrary to the requirements of the condition does not render its performance impossible.⁵ So a devise upon condition that the devisee, within six calendar months, give security not to marry B., is upon condition precedent.⁶

5. It was here made a question, from what period the time allowed for the performance of the condition was to be computed ; and it was held that the six months were exclusive of the day of the decease of the testator.⁶ Sir *William Grant*, M. R., here discusses the question and the cases in regard to the computation of time at considerable length, and concludes that there is no uniform rule, whether to include or exclude the day upon which an event happens, when a period of time is required to be computed from the event, but that such case must depend upon its own peculiar reasons ; and that, where an election is required to be * made within a given time after the decease * 284 of the testator, it is reasonable to give the required term after the day of the decease, since it is not presumable that the party could have had the benefit of that day for deliberation in regard to the choice. And this rule has been adhered to in later cases, upon general principles.⁷

6. And a devise upon condition that the devisee marry, and does not marry without the consent of the trustees,⁸ and a legacy upon condition that the legatee shall change the course of life he has too long followed, and give up all low company and frequenting public-houses, are conditions precedent, and such as the court will carry into effect.⁹

⁵ *Randal v. Payne*, 1 Br. C. C. 55.

⁶ *Lester v. Garland*, 15 Vesey, 248.

⁷ *Gorst v. Lowndes*, 11 Sim. 434, where numerous other cases are cited: *Toder v. Sansam*, 1 Br. P. C. 468; *Godson v. Sanctuary*, 4 B. & Ad. 255; *Pellew v. Wonford*, 9 B. & C. 134; *Blunt v. Heslop*, 8 Ad. & Ell. 577. In *Perry v. The Insurance Co.*, 99 Mass. 162, *Chapman*, Ch. J., says: "When time is computed from an act done, the general rule is to include the day; when it is computed from the day of the act done, the day is excluded."

⁸ *Ellis v. Ellis*, 1 Sch. & Lef. 1. See also *Wheeler v. Bingham*, 3 Atk. 364; *Fry v. Porter*, 1 Ch. Cas. 138; *Semphill v. Bayly*, Prec. in Ch. 562; *Pulling v. Reddy*, 1 Wils. 21; *Stackpole v. Beaumont*, 3 Vesey, 89; *Atkins v. Hiccocks*, 1 Atk. 500. Consent here means voluntary; not such as is extorted by the misconduct of the parties. *Stephenson's Trusts*, 18 W. R. 1066.

⁹ *Tattersall v. Howell*, 2 Mer. 26.

7. The American cases¹⁰ maintain the same distinction between conditions precedent and subsequent to which we have adverted in the English cases; and where such conditions precedent consist of several terms, all must be performed before the estate vests.¹¹

8. Conditions requiring an illegal act, as in restraint of marriage, are void; but if they are conditions precedent, the estate will not vest, it being of the essence of the bequest that it shall not become operative until or unless the condition is performed or takes effect.¹² And the same rule applies as to the vesting of an estate, made dependent upon the performance of a condition precedent, where the condition is or becomes impossible.¹² The estate which depends upon a condition precedent cannot vest where the condition fails of performance for any cause.¹³

* 285 * 9. But in regard to conditions subsequent, where the estate or bequest is made dependent upon their full or continued performance, if such conditions are illegal, or void for any cause, or are or become impossible of performance, the effect is not to defeat the estate dependent upon them, but that continues, having once vested, the same as if no condition had been attached.¹⁴

¹⁰ *Finlay v. King*, 3 Pet. (U. S.) 346; *Johnson v. Reed*, 9 Mass. 78; *Gardiner v. Corson*, 15 Mass. 500; *Barruso v. Madan*, 2 Johns. 145; *Ross v. Tremain*, 2 Met. 495.

¹¹ Co. Litt. 206, 218; *Taylor v. Mason*, 9 Wheat. 325, 350; *Moakley v. Riggs*, 19 Johns. 71, 72; *Wheeler v. Walker*, 2 Comm. 196; 2 Wms. Ex'rs, 1131, and Mr. Fish's note.

¹² 2 Jarman (ed. 1861), 9, 12; Co. Litt. 206, 206 b; *Robinson v. Wheelwright*, 6 DeG., M. & G. 535; *Earl of Shrewsbury v. Hope-Scott*, 6 Jur. n. s. 452, 472; *Poor v. Mial*, Madd. & Geld. 32; *Ridgway v. Woodhouse*, 7 Beav. 437.

¹³ *Roundel v. Curren*, 2 Br. C. C. 67; s. p. *Sprigg v. Sprigg*, 2 Vern. 394.

¹⁴ *Ridgway v. Woodhouse*, 7 Beav. 437; *Burchett v. Woolward*, Turn. & Russ. 442; 2 Jarman, 10; *Thomas v. Howell*, 1 Salk. 170. But a condition is not regarded as impossible because it is beyond the power of the devisee to perform it. It is so only when it becomes physically impossible of performance. 2 Story, Eq. Jur. § 1305. Where a condition subsequent becomes impossible by the act of the grantor, its effect is avoided. *United States v. Arredondo*, 6 Pet. (U. S.) 691, 745; *Whitney v. Spencer*, 4 Cow. 39. See also, upon the general question, *McLachlan v. McLachlan*, 9 Paige, 534. To the same effect is *Cheairs v. Smith*, 37 Miss. 646; *Brigham v. Shattuck*, 10 Pick. 306. *Hughes v. Edwards*, 9 Wheat. 489. A condition in a devise of land that the same shall not be liable to conveyance or attachment is void. *Blackstone Bank v. Davis*, 21 Pick. 42. And a devise dependent upon execut-

* 10. And in regard to estates over, where the first estate * 286 depends upon a condition precedent, which for any reason

ing a release within three months was held to be forfeited upon refusal to execute the release, but not because it was delayed beyond the time limited. *Taylor v. Popham*, 1 Br. C. C. 168; *Hollinrake v. Lister*, 1 Russ. 500, 508; *Williams v. Knipe*, 5 Beav. 273. But a legacy on condition of being claimed by legatee in a certain time and manner is forfeited if the legatee die without performing the condition. *Tulk v. Houlditch*, 1 V. & B. 248. But a reasonable performance of such a condition will secure the legacy. *Tanner v. Tebbutt*, 2 Yo. & Coll. C. C. 225. And where an estate is made dependent upon the death of a child, of whom a married woman was supposed to be enceinte, which proved not to be the fact, the estate was held valid. *Jones v. Westcomb*, Prec. in Ch. 316; s. p. *Holcroft's Case*, Moor, 486; *Bradford v. Foley*, 1 Doug. 63; *Meadows v. Parry*, 1 V. & B. 124. Legacy dependent upon the payment of a debt is valid if the debt be compounded. *Gath v. Burton*, 1 Beav. 478. See also *Hinckley v. Simmons*, 4 Vesey, 160; *Garrett v. Pritty*, 2 Vern. 293. Upon a bequest of £100, as an encouragement to accept the executorship of the will, and £10 for mourning, and £12 annually for his trouble, the legatee not accepting the office of executor, was held only entitled to the £10 for mourning. *Humberston v. Humberston*, 1 P. Wms. 332. Bequest to A. and his wife, and to the survivor in case A. should become incapable, or be discharged from collecting the rents of an estate: the wife held entitled on the death of A., although he collected the rents during his life. *Brittain v. Fleming*, 2 My. & K. 147. Where an estate or bequest depends upon the continued performance of a condition. *Dommett v. Bedford*, 6 T. R. 684; *Doe v. Hawke*, 2 East, 481; *Shee v. Hale*, 13 Vesey, 404; *Brandon v. Robinson*, 18 Vesey, 429; *Rippon v. Norton*, 2 Beav. 63. Separate estate of woman may cease upon marriage, and revive on discovery. *Tullett v. Armstrong*, 1 Beav. 1. Estates dependent upon insolvency. *Lord v. Bunn*, 2 Y. & C. C. C. 98. When an estate was given the testator's daughter on condition she survived any husband she might marry, and she never married, it was held the estate failed. *Lenox v. Lenox*, 10 Sim. 400. See also *Clarke v. Butler*, 13 Sim. 401; *Prestwidge v. Groombridge*, 6 Sim. 171; *Mackinnon v. Sewell*, 2 My. & K. 202. A condition that the legatee shall not be in any way concerned in keeping a public victualling house is not broken by being employed in such a house as a servant upon wages. *Jones v. Bromley*, Madd. & Geld. 137. Conditions against assignment valid. *Kearsley v. Woodcock*, 3 Hare, 185; *Lewes v. Lewes*, 6 Sim. 304; *Snowdon v. Dales*, id. 524; *Two-penny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, id. 642; *Page v. Way*, 3 Beav. 20. Where the legatee failed to perform a condition subsequent in the time required, through the omission of the executor to give him timely notice, it was held no excuse, and that the forfeiture of a portion of the legacy, according to the provisions of the will, must follow. *Hodges, in re*, L. R. 16 Eq. 92. And where the testator gave a legacy for the benefit of his daughter for life, and after her decease for her children, and provided, that, if it were not claimed by his daughter within three months, it should lapse into the

fails to be performed, so that the first estate never vests, it seems to be considered that the estate over will fail also, as being dependent upon that of the first donee.¹⁵

11. But in regard to estates over dependent upon the non-performance of conditions subsequent, where it is expressly provided that the estate shall go over upon the failure of the condition, the donor is held to mean precisely what he declares, and the estate over takes effect.¹⁶ But this rule is not regarded as at variance with the one before alluded to, in regard to the non-performance of conditions subsequent, where the same become impossible or illegal.¹⁷

12. But in regard to personal estate the English law follows the rule of the civil law, which made no distinction between conditions precedent and subsequent. Hence where a legacy is made dependent upon a condition precedent, which becomes impossible, the bequest will vest and become absolute.¹⁸ But where the performance of the condition forms the sole consideration or motive for

the gift, the failure of such performance will defeat the bequest.¹⁹ * And where the condition is rendered illegal by means of involving what is *malum in se*, the rule of the

residue, and the daughter failed, through absence and want of information, to make the claim within the time, it was held that the legacy failed. *Powell v. Rawle*, L. R. 18 Eq. 243.

¹⁵ *Boyce v. Boyce*, 16 Sim. 476; *Philpott v. St. George's Hospital*, 21 Beav. 134; 2 Jarman, 10; *Roundel v. Curren*, 2 Br. C. C. 67; *s. p. Doe v. Shipphard*, 1 Doug. 75; *Dicken v. Clarke*, 2 Y. & C. Ex. 572; *Hollingsworth v. Grasett*, 9 Jur. 932; 15 Sim. 52.

¹⁶ 2 Jarman, 11.

¹⁷ Ante, pl. 9. The courts have allowed constructions to produce results precisely the opposite of the apparent intent, while at the same time they will not allow an estate to take effect or be defeated, in exact and literal contravention of the words of the devise. That seems the only ground upon which the court can dispense with the performance of a condition subsequent in favor of the first devisee, or where there is no estate over, but will not defeat the estate over, which is declared to vest, in express terms, upon the failure of a condition subsequent.

¹⁸ *Reynish v. Martin*, 3 Atk. 330, 332; *Gath v. Burton*, 1 Beav. 478.

¹⁹ *Rishton v. Cobb*, 5 My. & Cr. 145; 2 Jarman (ed. 1861), 13. Where the bequest of an annuity to testator's nephew, during the life of his wife, was made upon condition that he behaved well to her, and he died during the life of his wife, it was held the condition was personal to him, and could be performed by nobody else; and so, the condition failing, the legacy ceased. *Neal v. Hanbury*, Prec. in Ch. 173.

civil law was, that both the condition and the gift were thereby rendered void.²⁰ This writer thus expresses the rule: "Where it is both impossible and dishonest, the disposition is thereby void."

13. It seems to be a universal rule, that, where conditions are repugnant to the estate to which they are annexed, they are absolutely void.²¹ Thus it has been held, that in a devise in fee, upon condition that the land shall for ever thereafter be leased at a prescribed rent, or shall be cultivated in a particular mode, the conditions are repugnant and void.²²

14. But the qualifications of a devise of real estate which are intended for the benefit of particular persons named have generally been upheld as creating a trust in favor of such persons.²³ The most common illustration of repugnant conditions in the devise of real estate is where the devise is general and unqualified, or is expressed to be in fee-simple, which is the same thing, and this is followed by a general, indefinite provision against the alienation of the estate. The courts have held such a condition void for repugnancy, from the earliest period.²⁴ And the same rule applies to devises in fee-simple incumbered with a restriction against the wife of the devisee being endowed, or the husband of such devisee being tenant by the curtesy,²⁵ or against charging any annuity upon the estate.²⁶ So also a provision that the estate given in fee to the first donee shall go over, if the first donee shall die intestate, or that he shall not alien or devise the estate during his life.²⁷ And a restriction upon the devisee in fee against mortgaging the estate, or levying a fine, or suffering a recovery, is void for repugnancy.²⁸

* 15. The earlier cases upon the question of restrictions * 288 upon alienation, repugnant to a devise in fee, do not seem to

²⁰ Swinb. pt. 4, § 6, pl. 16.

²¹ 2 Jarman, 14.

²² 2 Jarman, 14; *Attorney-General v. Catherine Hall*, Jacob, 380, 395.

²³ *Tibbits v. Tibbits*, 19 Vesey, 656. See also the extended discussion of this question, ante, pt. 1, § 43. See *Deering v. Tucker*, 55 Me. 284.

²⁴ Co. Litt. 206 b, 223 a.

²⁵ *Portington's Case*, 10 Co. Rep. 35 a; *Mildmay's Case*, 6 Co. Rep. 40 a.

²⁶ *Willis v. Hiscox*, 4 My. & Cr. 197, 201.

²⁷ 2 Jarman (ed. 1861), 15.

²⁸ *Ware v. Cann*, 10 B. & Cr. 433. See also, as bearing upon the foregoing illustrations, *Greated v. Greated*, 26 Beav. 621; *Barton v. Barton*, 3 Kay & J. 512; *Doe v. Glover*, 1 C. B. 448. The last case is considered by Mr. Jarman as overruled by the others. 2 Jarman (ed. 1861), 15, n. (t).

discriminate between a general restraint against alienation, and a restriction against aliening, except to one or more persons, or after the lapse of a certain period, or the occurrence of a particular event. These last restrictions upon alienation, being provisions in favor of particular persons, are in the nature of trusts in favor of such persons; and being capable of creation, beyond all question, by the use of proper terms, the inclination of the courts more recently is, to give them effect, according to the evident intention of the devisor.²⁹

16. And absolute bequests of personalty are liable to be affected in the same way, and to the same extent, by conditions against alienation or use. If the restriction be general and unqualified, it is void as to personalty the same as to realty.³⁰

²⁹ *Large's Case*, 2 Leon. 82; *Churchill v. Marks*, 1 Coll. C. C. 441, 445; *Pierce v. Win*, 1 Vent. 321; s. c. *Pollex*. 435; *Doe v. Pearson*, 6 East, 173. But if the right of alienation be restricted to a single person, it will be regarded as an arbitrary and unreasonable restraint, and void. *Attwater v. Attwater*, 18 Beav. 330. This case is explained and limited, *In re Macleay*, 23 W. R. 718, where the general question of the effect of conditions in restraint of alienation by devisees is extensively considered by *Jewell*, M. R. It was here decided that a devise, upon condition never to sell out of the family, i. e., away from blood relations of the devisor, is entirely valid, and unobjectionable. The test here declared is, whether the condition expressly or in fact takes away all power of alienation or not; and that it will be valid, unless entirely capricious and unreasonable, and equivalent to a denial of all power of alienation, as in *Attwater v. Attwater*, supra. The subject of the legality of conditions, in a devise against alienation, is largely and learnedly discussed by *Christiancy*, J., in a trust case in Michigan, *Mandlebaum v. McDonell*, 29 Mich. 78, and the following points determined: 1. The devise of the rents and profits of land, or the proceeds of the sale of the same, is the same in legal effect as the devise of the land; and any limitation upon the disposition of the same by the devisees is to receive the same construction as if it embraced the land itself. 2. A restraint upon all alienation of an estate in fee for ever so short a time is void. 3. It may be that conditions against alienation to particular persons, or to any but persons named, may be upheld; but query. 4. These dicta and decisions, that a condition suspending the power of alienation for a reasonable time is valid, do not rest upon sound principle or good authority.

³⁰ *Co. Litt.* 227 a; *Bradley v. Peixoto*, 3 Vesey, 324; *Rishton v. Cobb*, 5 My. & Cr. 145, 153; *Green v. Harvey*, 1 Hare, 428; *Watkins v. Williams*, 3 Men. & G. 622; *In re Yalden*, 1 DeG., M. & G. 53; *Hughes v. Ellis*, 20 Beav. 193; *In re Mortlock's Trust*, 3 Kay & J. 456. But alienation within a limited period may be restrained. *Churchill v. Marks*, 1 Coll. C. C. 441; *Graham v. Lee*, 23 Beav. 388; *In re Payne*, 25 Beav. 556.

17. The general rule is, that property cannot be bequeathed in its entirety, with a restriction upon any portion going to assignees in bankruptcy or insolvency, or in any other form to creditors.³¹ But it will be found that this rule, like many of the others adverted to under the head of repugnant conditions, is one of form, more than of substance. The question of gifts determinable upon alienation by the donee, whether voluntarily or by act of law, is here very carefully and elaborately considered, and the cases extensively reviewed and explained by the Vice-Chancellor, the present Lord Justice *Turner*, and the following conclusions reached, which may be regarded as forming the basis of the law upon this * point at the present time. The general propositions * 289 to be deduced from this able judgment are: (1.) That property cannot be given, either for life, or absolutely, without the power of alienation being incident to the gift.

(2.) That either a life or an absolute estate by request may be legally so framed as to cease upon the happening of a particular event. And for that purpose it will make no difference whether an estate over is given or not. These estates may as well be made to cease absolutely, as for the purpose of going over. No greater effect can be given to a limitation over, than to an express declaration that the life-interest shall cease.

(3.) That there is an essential distinction between a disposition to a man until he shall become bankrupt, and after his bankruptcy over, and a gift to a man for life, with a provision restraining alienation.

(4.) There is an important and essential distinction between compulsory and voluntary alienation.³²

18. But the courts seem to have required that it should be very clearly expressed in the bequest, that the estate given should cease upon the happening of the event intended to determine it, whether bankruptcy, voluntary alienation, or any other. If there seems a fair doubt whether the event named was intended to limit the estate, or to restrict its use or alienation, the courts seem to

³¹ *Rochford v. Hackman*, 9 Hare, 475. See upon this point *Keyser's Appeal*, 57 Penn. St. 236; *Koehnig's Appeal*, id. 352.

³² The learned judge here discusses the point at length, and his opinion is a valuable commentary.

have favored the latter construction, with the apparent purpose of getting rid of it altogether on account of repugnance.³³

* 290 * 19. There is no question the testator may bequeath property for the mere purpose of benefiting the donee personally, and provide that no creditor or purchaser shall take any interest or benefit of the same. And as the law is clearly settled to this extent, it is wonderful that the courts should find so much embarrassment, and produce so much conflict and confusion, in carrying into effect provisions most clearly and obviously of this character.³⁴ And it is now settled, that, if such is the clearly declared purpose of the testator, the bequest will fail, upon the legatee or devisee becoming insolvent or bankrupt, even where it occurs during the life of the testator; and any gift over will immediately take effect,³⁵ in that case, upon the death of the testator.

20. Conditions in restraint of marriage occupy a large space in treatises upon wills. But the cases are very numerous, and not entirely reconcilable with each other. The true rule upon the point is, that one who has an interest in the future marriage and settlement of the person in life may annex any reasonable condition to the bequest of property to such person, although it may

³³ *Wilkinson v. Wilkinson*, Coop. 259; s. c. 3 Swanst. 515; *Lear v. Leggett*, 2 Sim. 479; *Whitfield v. Prickett*, 2 Keen, 608; *Graham v. Lee*, 23 Beav. 388. See *Cooper v. Wyatt*, 5 Madd. 482. The more reasonable construction in these cases would seem to be to hold all interests fairly expressed to be dependent upon the donee not incumbering or conveying the estate, as intended to limit their continuance to the occurrence of that event, thus carrying out the intent of the testator, and not the mere technical and arbitrary rules of construction adopted by the courts, as is done in most other cases. We look for the time when this will be done more and more. We think the course of recent decisions is in that direction. Where the testator appointed some and devised other real estate to the first taker, determinable upon her doing any thing whereby she should be deprived of her control over the rents and profits, so that her receipt alone should not be a full discharge for the same, and she, being testator's widow, married again without making any settlement, it was held her estate determined, and the remainders were accelerated, both in the appointed and devised estates. *Craven v. Brady*, Law Rep. 4 Eq. 209; s. c. affirmed by the Lord Chancellor, Law Rep. 4 Ch. App. 296.

³⁴ *Yarnold v. Moorhouse*, 1 Russ. & My. 364. -

³⁵ *Manning v. Chambers*, 1 DeG. & S. 282; *Sharp v. Cosserat*, 20 Beav. 470; 2 Jarman, 33; *Easterly v. Keney*, 36 Conn. 18, post, n. 93. See ante, n. 34.

operate to delay or to restrict the formation of the married relation, and so be, to some extent, in restraint of marriage.³⁶

* 21. It is settled from an early day, where the bequest * 291 is made a charge upon land, as no interest vests until the time of payment, that if that is made dependent upon the performance of a particular condition, as marrying with the consent of the trustees or others, although in restraint of marriage, and such as would be held in *terrorem* and of no force in a pecuniary legacy, yet, being attached to a charge upon land, no interest will vest until the condition is performed.³⁶ Consent after the marriage will avail nothing.³⁷ And the ecclesiastical courts hold a provision, that the legatee, in personal legacies, shall not be entitled to receive the same, unless upon marriage with consent of persons named, to be merely in *terrorem*, and not a valid condition,³⁸ especially where there is no gift over.³⁹

³⁶ *Haughton v. Haughton*, 1 Molloy, 611; post, pl. 30; *Stackpole v. Beaumont*, 3 Vesey, 89, is where the donee was restrained from marriage before the age of twenty-one, without consent of trustees, and it was held valid, both as to a rent-charge out of real estate and a personal legacy. In this last case, Lord *Loughborough*, Chancellor, goes into a review of the doctrine of conditions in restraint of marriage being void, and concludes that the rule is one of an arbitrary character, adopted from the Roman civil law; and having no just application to the English law, it had been strangely perverted and embarrassed in its application by the senseless refinements of the judges, until it had become impossible for any one to know, with any approximation towards certainty, what the law of England upon the subject is. His lordship concludes: "The authorities stand so well ranged" (upon either side) "that the court would not appear to act too boldly, whichever side of the proposition they should adopt; but I have always, upon repeated consideration, thought there was not much reason in any of the determinations founded upon a rule applicable to the laws of the country from which it is taken, but not to this country." We must confess it has always seemed to us that there is great truth in the exposition of this subject and of the decisions of the courts upon the question, here made by the learned Chancellor; and that the strictures which have been made upon its good taste and sound discretion are without much foundation. For where there are hundreds of conflicting cases upon a point, and no general principle running through them by which they can be arranged or classified, what better can be done than to abandon them all, and fall back upon the reason and good sense of the question, as the courts have of late attempted to do?

³⁷ *Harvey v. Aston*, 1 Atk. 361, where the question is elaborately discussed, and all the early cases cited and commented upon. *Reynish v. Martin*, 3 Atk. 330.

³⁸ *Reynish v. Martin*, 3 Atk. 330.

³⁹ 2 Jarman (1861), 39, 40.

22. We will now state briefly some of the restraints upon marriage which have been decided by the English courts to be reasonable and valid, such as conditions prohibiting the widow of the testator from marrying again.⁴⁰ And a condition generally not to marry without consent, where there is a gift over in the event of the first donee marrying without such consent, has been held valid in a very great number of cases.⁴¹ And where the legatee is to have a portion of the estate, whether marrying with consent or not, no effect can be given to it on account of its being in restraint of marriage, which it would not otherwise have; but the legatee will take the alternative provided.⁴² So also where * 292 the * bequest depends upon marriage with consent, or some alternative event, as attaining a certain age.⁴³

23. It seems to be the opinion of Mr. Jarman,⁴⁴ that it is, "not easy to calculate whether future judges will adopt the distinctions which modern cases present, or treat them as getting rid altogether of the in terrorem doctrine as applicable to conditions precedent," and thus allow all conditions tending to limit and restrain the freedom of choice, as to the time and manner of marriage, which are not inconsistent with proper self-respect and independence in the person so restrained, as entirely valid, and to be enforced. That is evidently the view of Lord *Loughborough*, in *Stackpole v. Beaumont*.⁴⁵

24. But it seems there is no question that conditions subsequent in restraint of the freedom of marriage have usually been construed to be merely in terrorem.⁴⁶ And a legacy given on marriage with consent, clearly cannot vest except upon marriage, as that is indispensable by the terms of the bequest. And where the law dis-

⁴⁰ *Lloyd v. Lloyd*, 2 Sim. N. S. 255; *Grace v. Webb*, 15 Sim. 384. The early cases made no distinction between the case of a widow and any other person. *Marples v. Bainbridge*, 1 Madd. 590.

⁴¹ 2 Jarman (1861), 40, n. b, where the cases bearing upon the point are cited.

⁴² *Creagh v. Wilson*, 2 Vern. 572; *Gillet v. Wray*, 1 P. Wms. 284.

⁴³ *Hemmings v. Munckley*, 1 Br. C. C. 303; *Scott v. Tyler*, 2 Br. C. C. 431. Some other cases have been named before as bearing incidentally upon this point.

⁴⁴ 2 Wills, 43.

⁴⁵ *Marples v. Bainbridge*, 1 Madd. 590; *Wheeler v. Bingham*, 3 Atk. 364, and cases cited.

penses with consent, as being merely in *terrorem*, there being no bequest over, it cannot dispense with the marriage also.⁴⁶

25. A residuary clause is not equivalent to a bequest over, in rendering a provision requiring consent to marriage operative,⁴⁷ unless where there is an express provision, that, in the event of the direction being disregarded, the bequest shall sink into the residue.⁴⁸

26. There has been considerable discussion in the books, in later cases, whether a condition requiring marriage with the consent of trustees or others is forfeited by a first marriage without such consent; since the devisee, or donee, has the whole of life, ordinarily, in which to perform a condition of this character; and it is supposable, after a first marriage without consent, that such husband or wife may predecease the donee, and thus leave him or her to marry again with such consent. It seems agreed on * all hands that a first marriage with consent is a * 293 sufficient performance of the condition.⁴⁹

27. Where the consent of more than one person is required, all must concur, and that of a majority will not be sufficient.⁵⁰ It was once supposed that this rule required the consent of a trustee or executor, who had renounced his office, and refused to act under the trust.⁵¹ But it seems now well settled that the consent of such renouncing trustee is not required.⁵² Where all or any of the persons whose consent is required decess, this renders it impossible to procure such consent, and is the same as if the condition had become impossible.⁵³

28. We had occasion, in preparing the last edition of Story's Equity Jurisprudence, to revise the late cases bearing upon this

⁴⁶ *Garbut v. Hilton*, 1 Atk. 381; 2 Jarman (1861), 43.

⁴⁷ *Semphill v. Bayly*, Prec. in Ch. 562; 2 Jarman, 43, n. 9.

⁴⁸ *Wheeler v. Bingham*, 3 Atk. 364; *Lloyd v. Branton*, 3 Mer. 108, 117.

⁴⁹ *Randal v. Payne*, 1 Br. C. C. 55; *Lowe v. Manners*, 5 B. & Ald. 917. See also *Page v. Hayward*, 2 Salk. 570. But first marriage is what is commonly intended by such provision.

⁵⁰ *Clarke v. Parker*, 19 Vesey, 1.

⁵¹ *Graydon v. Hicks*, 2 Atk. 16.

⁵² *Worthington v. Evans*, 1 Sim. & Stu. 165; *Boyce v. Corbally*, Ll. & Go. t. Plunket, 102.

⁵³ *Aislabie v. Rice*, 3 Madd. 256; 2 Jarman (1861), 49. But where the consent of certain persons by name is required, the consent cannot be given by survivors. *Peyton v. Bury*, 2 P. Wms. 626. But this has been questioned, 2 Jarman, 49.

point, both English and American,⁵⁴ which we beg leave here to repeat. So also conditions annexed to a gift, the tendency of which is to induce husband and wife to live separate, or be divorced, are, upon grounds of public policy and public morality, held void. In an early case,⁵⁵ where the father bequeathed a sum of money to his daughter "if she will be divorced from her husband," the condition was held void; and although precedent in its character, that, nevertheless, the gift took effect. And in another case,⁵⁶ where the testator directed, that, if "his niece lived with her husband, his executors should pay her £2 per month, and no more, but if she lived from him, and with her mother, then they should allow her £5 per month," it was held that the legatee was entitled to the largest sum without living apart from her husband;

and Lord-Keeper *Henly* thought, as the condition was "contra bonos * mores, the legacy was simple and pure." And in a recent case,⁵⁷ where an annuity was bequeathed to a daughter, a married woman, "in case she should be living apart from her husband, and should continue to do so" during the life of the testator's widow; and providing that the annuity should cease whenever the annuitant should cohabit with her husband; and where the will contained also a residuary trust, the income of which was to be paid to the daughter during such time as she should continue to live apart from her husband; but directed, that, whenever she should cohabit with her husband, such income should be paid to other legatees; the will also containing a trust for children of the daughter by any other husband; the daughter and her husband living apart at the date of the will, but being reconciled and living together at the death of the testator and subsequently; it was held that the daughter was entitled to the benefit of all the provisions of the will in her favor. The Vice-Chancellor, *Knight Bruce*, said, in giving judgment, "It is impossible to read the will without perceiving that the testator's wish and object were to obstruct a reconciliation, and prevent the wife from living with her husband; and that, by that wish, by that object, its provisions as to her were influenced and directed. The weight of authority. . . and the principles of the civil law, as far as I consider them

⁵⁴ 1 Story, Eq. Jur. §§ 291 a, 291 b, 291 c, 291 d, 291 e.

⁵⁵ *Tennant v. Braie, Tothill*, 141.

⁵⁶ *Brown v. Peck*, 1 Eden, 140.

⁵⁷ *Wren v. Bradley*, 2 DeG. & Sm. 49.

applicable, seem to me to render a decision of this case, in Mrs. Wren's favor, consistent, at once, with technical equity and moral justice." ⁵⁸

29. Conditions annexed to devises both of real and personal estate to a widow, that they shall become inoperative in the event of the marriage of the devisee, have been generally recognized as valid both in England and America.⁵⁹ It has been, in some American cases, maintained that such conditions do not apply to real estate, and sometimes, even, that conditions in restraint of marriage, generally, are valid at common law.⁶⁰ But no such principle is fairly maintainable. There seems no impropriety, however, in allowing the operation of conditions in restraint of the marriage of widows, in favor of such persons as may have a reasonable interest, either pecuniary or moral, in the question of their * marriage. It has accordingly been considered that such * 295 conditions or limitations, in regard to the continuance of an estate, whether in real or personal property, were entirely valid.⁶¹ And the American cases recognize the same right to annex conditions to a gift, in restraint of the marriage of the donee, although not a widow, provided such conditions be not unreasonable, as in the case of an infant, unless with the consent of her guardians.⁶² But a condition subsequent, attached to a bequest of personalty, in restraint of marriage, even in the case of a widow, where no limitation over is provided for, has been held void as being merely in terrorem.⁶³ So also conditions in general restraint of marriage, whether of males or females, and whether before marriage or not, are held inoperative as against sound policy.⁶⁴ We consider that there is no well-

⁵⁸ 2 White and Tudor, *Leading Cases in Equity*, 204, 205.

⁵⁹ 1 Story, *Eq. Jur.* § 285, and cases cited.

⁶⁰ *Phillips v. Medbury*, 7 Conn. 568; *Commonwealth v. Stauffer*, 10 Penn. St. 350.

⁶¹ *Pringle v. Dunkley*, 14 Sm. & M. 16; *Hughes v. Boyd*, 2 Sneed, 512; *Hawkins v. Skeggs*, 10 Humph. 31; *Collier v. Slaughter*, 20 Ala. 263; *Bennett v. Robinson*, 10 Watts, 348; *McCullough's App.*, 12 Penn. St. 197; *Vance v. Campbell's Heirs*, 1 Dana, 229; *Holmes v. Field*, 12 Ill. 424.

⁶² *Collier v. Slaughter*, 20 Ala. 263.

⁶³ *M'Ilvaine v. Gethen*, 3 Whart. 575; *Hoopes v. Dundas*, 10 Penn. St. 75; *Parsons v. Winslow*, 6 Mass. 169.

⁶⁴ *Maddox v. Maddox*, 11 Gratt. 804; 2 *Leading Cases in Eq.* 416, Am. note by Hare & Wallace; *Waters v. Tazewell*, 9 Md. 291.

recognized difference, which may be said to rest upon principle, between the case of a widow and others in this respect. It depends wholly upon the inquiry, whether the condition is reasonable in itself, under the particular circumstances. There is, in the American cases, the same recognized difference already adverted to, between real and personal estate, as to the operation of a gift upon condition precedent, which is illegal. In the former case, the estate will not vest unless the condition be performed, notwithstanding it being against law ;⁶⁵ but in the latter case, the condition being void, the estate takes effect the same as if it had been absolute.⁶⁶ But it has been held that the compromise of a litigation between the parties themselves, without the intervention of third parties, is not rendered invalid in consequence of being founded upon the consideration of marriage.⁶⁷

The English cases, and some of the American cases, certainly do argue a substantial difference between the condition which
 * 296 a * man may annex to a gift to his widow, and one to any other woman.⁶⁸ And it seems clear that the law is not the same in case of a man as of a woman, in regard to the right to avoid the bequest upon second marriage. (a)

The Vice-Chancellor, in *Lloyd v. Lloyd*, supra, says : "The law recognizes in the husband such an interest in his wife's widowhood as to make it lawful for him to restrain her from making a second marriage." And it is here further said, that there is a difference, even in equity, between a condition and a limitation, in a gift to one not married ; and that one may give an estate to any woman, to continue so long as she shall remain single ; but if he give a life or other estate, and then append a condition to defeat that estate, if she marries, the condition is not good. Such a distinction may be valid, perhaps, in regard to the creation of estates in the realty by deed ; but we question if it could fairly be maintained in courts of equity,

⁶⁵ 2 Greenl. Cruise, 16.

⁶⁶ *Maddox v. Maddox*, supra.

⁶⁷ *Donallen v. Lennox*, 6 Dana, 89.

⁶⁸ *Lloyd v. Lloyd*, 2 Sim. n. s. 255. And in *Grace v. Webb*, 15 Sim. 384, the same view is maintained. The construction of the courts is of late certainly favorable to the upholding of gifts to women dependent in any sense upon their living apart from their husbands, or remaining unmarried, treating such condition as void. *Shewell v. Dwarries, Johns.* (Eng. Ch.) 172; *Bellairs v. Bellairs*, 22 W. R. 942.

(a) *Allen v. Jackson*, 23 W. R. 487; L. R. 19 Eq. 631.

in regard to testamentary gifts of real estate; and especially of personalty, where the general intent of the donor is more to be regarded than the precise technical form of the gift. And we apprehend that there is no substantial reason, either in law or morals, why a man should be allowed to annex an unreasonable condition in restraint of marriage, one merely in terrorem, in the case of a wife, more than of a child, or any other person, in regard to whose settlement in life he might fairly be allowed to take an interest; but the cases, many of them certainly, maintain such distinction.

30. The question as to what conditions affecting marriage are valid must depend upon the circumstances of each particular case, and will be very materially affected by the consideration, how far the condition was one fairly applicable to the relation of the parties, and the peculiar views and situation of the donor and donee. It has been decided, as already stated, that a condition in a devise, that if the devisee "shall marry contrary to the established rules of the people called Quakers, such devise should cease as to him and his issue, and be void," is valid and legal.⁶⁹ So it is a legal condition * which avoids the gift, provided the * 297 donee marry a Scotchman,⁷⁰ or a Papist,⁷¹ and many others, some of which have already been referred to. But where the father gave a legacy to his daughter, "during her separation from her husband," she then living separate from him, but being reconciled and living with him at the father's death, it was held a legal condition, and that the legatee took nothing under the will, and the voluntary separation subsequent to the death of the testator would not entitle her to it.⁷² And it was held in a recent English case, that where a father revoked the provision in his will, on condition that his daughter became a nun, it was a legal condition, and that the provision ceased on her becoming a nun, although there was no bequest over.⁷²

31. This whole subject, as to what conditions in restraint of mar-

⁶⁹ *Haughton v. Haughton*, 1 Molloy, 611. Lord *Manners*, Chancellor, here said, with some justice perhaps, "The only point on which I feel the least hesitation is this, whether the court ought not to consider a condition, which in effect forbids marriage with any member of the Established Church, as contrary to public policy."

⁷⁰ *Perrin v. Lyon*, 9 East, 170.

⁷¹ *Duggan v. Kelly*, 10 Ir. Eq. 295; 1 Eq. Ca. Ab. 110, pl. 2.

⁷² *Cooper v. Remsen*, 5 Johns. Ch. 459.

riage shall be regarded merely in terrorem, and so void, and what as valid, is certainly, both in England and this country, involved in great uncertainty and confusion. In the case of *Dickson's Trust*,⁷³ Lord *Cranworth* repudiates the existence of any such rule of law, as that conditions, where there is no bequest over, are to be held inoperative, as mere idle threats, in terrorem. And this experienced equity judge here gives utterance to an opinion, which could scarcely fail to strike all minds, that have examined the cases upon the point, as eminently just. He says: "It is impossible to refer to the numerous cases on this subject, without feeling that the judges, in deciding them, have never felt very sure of the ground on which they were treading."

Certain general rules may be safely affirmed to exist; as that all such conditions which are unreasonable, either on account of the donor having no recognized right to interest himself in the marriage of the donee, or because he goes beyond the just limits of a right which does exist to a certain extent, or because he attempts to exercise his control in an improper manner, or to an improper extent, are void. Beyond this the cases seem to finally re-
 * 298 solve * themselves into the mere judgment of the court upon the circumstances of each particular case. The latest decision of the English courts upon this question (1876) (*a*) seems to place it upon reasonable grounds, although, possibly, somewhat difficult of application. If the condition or limitation of the bequest over is made dependent upon the marriage of the female devisee, in such form as to indicate the leading purpose in the testator to discourage her marriage, it will be held void as against good policy. But if the estate is passed over to others upon the marriage of the first devisee, apparently because such persons will more need the aid therefrom arising than the first devisee after marriage, or for any other bona fide purpose, aside from the hindering or discouragement of the marriage of the first devisee, the condition will be held legal, and the estate pass over upon the marriage.

32. Where a bequest is conditioned that the donee shall assume

⁷³ 1 Sim. N. S. 37. See also *Morley v. Rennoldson*, 2 Hare, 570; *Underwood v. Morris*, 2 Atk. 184; *Knight v. Cameron*, 14 Vesey, 389; *Malcolm v. O'Callaghan*, 2 Madd. 349. A mere wish that the devisee should not marry without making a marriage settlement does not create a condition. *Rayfield v. Gaines*, 17 Gratt. 1; *Rhett v. Mason*, 18 id. 541.

(*a*) *Jones v. Jones*, 24 W. R. 274.

the name of the testator, or any other one, it is in general sufficient that he assume such name by his own act, and thus acquire the reputation of the name.⁷⁴ It is not in general requisite to procure an act of the legislature in order to assume a new surname.⁷⁵ But if the will required that in terms, it might be held necessary.

33. Where the condition of the bequest requires the donee to reside in a particular house, all that is required is that he reside there such portion of the time as to maintain that as his legal domicile or residence, for the time required by the condition.⁷⁶

34. The rule of the English law, as to conditions against disputing the will, annexed to some bequests, seems to be in a most absurd state of confusion. It is held that such a condition is void, as to personalty,⁷⁷ unless the legacy be given over in the event of failure to perform the condition.⁷⁸ But that such a condition is entirely valid as to real estate, whether there be any gift over or not.⁷⁹ And it is agreed that there is no substantial ground for any distinction, in this respect, between real and personal estate.⁸⁰ Hence we assume, that, in this country, any such condition which is reasonable, as one against disputing one's will surely is, as nothing can be more in conformity to good policy than to prevent litigation, will be held binding and valid. And, as before stated, a condition avoiding the bequest upon the donee becoming a nun is valid, and will be enforced.⁸¹ Acceptance of the legacy renders the condition

⁷⁴ *Davies v. Lowndes*, 2 Scott, 71; s. c. 1 Bing. N. C. 597; *Doe v. Yates*, 5 B. & Ald. 544; *Barlow v. Bateman*, 3 P. Wms. 65. But this last case was reversed by the Ho. Lds. 2 Br. P. C. Toml. 272.

⁷⁵ *Sir J. Jeckyll*, M. R., in *Barlow v. Bateman*, 3 P. Wms. 65.

⁷⁶ *Wood*, V. C., in *Walcot v. Botfield*, Kay, 534; 2 *Jarman*, 51, 52; *Wynne v. Fletcher*, 24 Beav. 430; *Dunne v. Dunne*, 3 Sm. & Gif. 22; *Attenborough v. Thompson*, 2 H. & N. 559.

⁷⁷ *Powell v. Morgan*, 2 Vern. 90; *Loyd v. Spillet*, 3 P. Wms. 344. /

⁷⁸ *Cleaver v. Spurling*, 2 P. Wms. 526.

⁷⁹ *Cooke v. Turner*, 15 M. & W. 727; s. c. 14 Sim. 218, 493; 2 *Jarman* (1861), 53.

⁸⁰ 2 *Jarman* (1861), 53, and notes. Held in *Bradford v. Bradford*, 19 Ohio, n. s. 546, that such a condition is valid. So also by the law of Canada. *Evanturel v. Evanturel*, 23 W. R. 32, on appeal before the Privy Council; s. c. L. R. 6 P. C. 1. But it is here stated, that, by the English law, a condition against disputing the will is only valid where the bequest is legal and there is a bequest over in case the legacy is avoided by the condition, citing *Cooke v. Turner*, *supra*.

⁸¹ *Dickson's Trust*, 1 Sim. n. s. 37.

binding upon the legatee, upon the well-known doctrine of election.⁸²

* 299 * 35. The American cases are not so numerous, upon the question of conditions in bequests, as the English ; refinements of this character being the result of advanced civilization and large estates, and to some extent of the leisure and nice distinctions of the profession and of the judicial tribunals. But the American cases have, as usual, in the main, attempted to follow the rules declared by the English courts ; and where they have failed to do so, the decisions will not generally be regarded as of much weight in other courts.

36. As to the form of conditions, it is clear they cannot depend upon the particular phraseology, but entirely upon the general intent, of the will. And where the words were in the form of a condition precedent, but the intentions of the testator, as collected from every part of the will, clearly indicated a different purpose, it was held that the latter must prevail.⁸³ The cases are very numerous upon this point, but all in the same direction.⁸⁴

37. The American courts have commonly, as far as we have noticed, held strictly to the early doctrine of the English courts of law, that, in a devise in fee, restraint upon any use or alienation is void for repugnancy. Thus *Shaw*, Ch. J.,⁸⁵ says: "A chief ingredient in the legal right of property is a right to dispose of it, a right to exchange, sell, or give it away."

⁸² *Attorney-General v. Christ's Hospital*, Taml. 393 ; *Gregg v. Coates*, 23 Beav. 33 ; post, pl. 40 ; *Egg v. Devey*, 10 Beav. 444. But it has been held that the testator cannot impose a condition upon his widow of this character which shall operate except by way of election. *Runnels v. Runnels*, 27 Texas, 515.

⁸³ *Stark v. Smiley*, 25 Me. 201 ; *Burnett v. Strong*, 26 Miss. 116 ; *Worman v. Teagarden*, 2 Ohio, n. s. 380 ; *Wheeler v. Walker*, 2 Conn. 196 ; *Fox v. Phelps*, 17 Wend. 393 ; *Hapgood v. Houghton*, 22 Pick. 480 ; *Tower's Appropriation*, 9 Watts & Serg. 103. See 2 Wms. Ex'rs, 1132, and Fish's note.

⁸⁴ *Johnson v. Reed*, 9 Mass. 78, 83 ; *Gardiner v. Corson*, 15 id. 500, 503 ; *Finlay v. King*, 3 Pet. (U. S.) 346 ; *Barruso v. Mada*, 2 Johns. 145.

⁸⁵ In *Gleason v. Fayerweather*, 4 Gray, 348, 351. And the same principle is recognized in a great number of American cases. *Newkerk v. Newkerk*, 2 Caines, 345 ; *M'Williams v. Nisly*, 2 Serg. & R. 507 ; *Walker v. Vincent*, 19 Penn. St. 369 ; *Blackstone Bank v. Davis*, 21 Pick. 42 ; *Hall v. Tufts*, 18 id. 455 ; *Hawley v. Northampton*, 8 Mass. 3, 6 ; *Schermerhorn v. Negus*, 1 Denio, 448. But such a restriction upon alienation until the devisee shall attain thirty-five years of age is valid. *Stewart v. Brady*, 3 Bush, 623.

38. But, notwithstanding the close adherence to this rule, — of which, in the abstract, there is no just ground to complain, — there are so many exceptions to it constantly recognized and enforced by the courts, that we cannot fail to perceive, that where the devisor deems it prudent to impose any restriction upon the alienation of * the estate by the first donee, or upon the claim of * 300 creditors to take any benefit of the same, it is entirely competent for him to do so ; and all that is requisite to carry the same into effect is some care and skill in so drawing the declaration of trust, that it shall not go full in the face of any of the old technicalities which the courts have so long struggled to maintain, in spite of the good sense of mankind to the contrary, that they sometimes appear to be more watchful to defend such an isolated technicality, which has nothing but positive law to stand upon, than they do the most obvious equities, which will so far command the sympathies of all, as not to require much advocacy or defence from the courts.

39. Thus, while it is held that a naked and absolute condition in a devise, that the land shall not “ be subject or liable to conveyance or attachment,” is void,⁸⁶ it is, nevertheless, affirmed in the same case, that where a devise is made to a minor, provided he shall not come into possession, occupy, or have any advantage of the estate, during his minority, except through his guardian, who is to lease, occupy, and improve the same, the condition is good and valid in law.⁸⁷ And although a direction in the will that all the legatees shall contribute to the support of the testator may be void for uncertainty, and also because the legacies upon which this is attempted to be made a charge do not take effect until the death of the testator, when all provisions for his support of necessity become nugatory,⁸⁸ there can be no question that a charge upon a legacy or devise for the support of testator’s children or widow, or any other person, is entirely valid.⁸⁹ And where security is

⁸⁶ *Blackstone Bank v. Davis*, 21 Pick. 42.

⁸⁷ *Wilde, J.*, citing *Smithwick v. Jordan*, 15 Mass. 113.

⁸⁸ *Colwell v. Alger*, 5 Gray, 67.

⁸⁹ *Crandall v. Hoysradt*, 1 Sandf. Ch. 40 ; *Beekman v. Hudson*, 20 Wend.

53. A condition in a devise to the widow, that she shall support the testator’s mother, is valid. *Marwick v. Andrews*, 25 Maine, 525. And a condition that the devisee shall remove a mortgage from the estate, no time being fixed in the will, must be performed in a reasonable time. *Ross v. Tremain*, 2 Met. 495; *Carter v. Carter*, 14 Pick. 424.

required to be given for the performance of such a condition, it is construed a condition precedent to taking the estate.⁹⁰

40. By accepting a devise on condition of maintaining
* 301 certain * persons during the continuance of the estate, the devisee becomes bound to perform the condition, without regard to the fact whether the income of the estate is sufficient to support such persons or not.⁹¹ Thus, where the testator devised to his wife for life all his estate, real and personal, upon condition that his two unmarried daughters be maintained therefrom, it was held to give the wife a conditional estate for life, and the absolute disposal of the rents and profits of the same during its continuance, without any accountability to him who was entitled in remainder or reversion, and that she might lawfully cut fuel from the land sufficient for her own use and the use of those employed in cultivating the estate ; and that the wife, having accepted the devise, was bound to perform the condition, although the income of the estate fell short of the requisite expenditure in its performance.

41. And it has been determined by the New York Court of Appeals ⁹² that a provision in a will, that the interest of a devisee for life shall cease on the recovery of a judgment by creditors with a view to reach it, is entirely valid, and will be enforced by a court of equity. This case was where the testator, with a view to provide for the support of a son and his family, bequeathed his real and personal estate to his executors, and directed them to sell it and invest the proceeds, and gave the use and income thereof to the son for life, and the principal over to others on the decease of the son. The creditors of the son filed a creditor's bill to reach his interest, and it was held that a valid trust had been created under the will for the support of the son and his family, and that creditors could not reach the income of the fund, unless there was a surplus beyond what was requisite to carry the trust into effect.

⁹⁰ *Jackson v. Wight*, 3 Wend. 109; *Hogeboom v. Hall*, 24 Wend. 146. And a direction that the persons to be maintained shall reside with the devisee does not require continuous residence, but it may be resumed after interruption. *Ib.*

⁹¹ *Smith v. Jewett*, 40 N. H. 530. This may be enforced by an action at law or by resort to a court of equity. *Pickering v. Pickering*, 6 N. H. 120; *Veazey v. Whitehouse*, 10 N. H. 409.

⁹² *Bramhall v. Ferris*, 14 N. Y. 41.

By the will and codicil in this case, the executors, who held the property in trust, were, in the event of a judgment obtained by creditors against the son, which it was provided should terminate his interest, directed to apply the income of the fund to the support of his family, by paying the same to his wife, or in any other mode which, in their discretion, they saw fit to adopt. This we think may be regarded as settling the law upon this point to this extent; and this is the only practical question involved in the

* inquiry, what restrictions upon alienation the deviser may * 302 impose upon the devisee. It had been before decided in this state, that where the legacy was so bequeathed that the legatee might compel the immediate payment of the entire amount into his own hands, free from all extraneous control, that a provision in the will, to the effect that neither the legacy nor the interest thereof should be liable to any of the creditors of the legatee for the payment of his debts, will have no effect to hinder the creditors from reaching it.⁹³

⁹³ *Hallett v. Thompson*, 5 Paige, 583. But where the father in his will provided that his executors should set apart a sum sufficient, at six per cent, to raise an annuity of \$100, which he directed to be paid to his son in quarterly payments during his life, and after his death that the principal sum be paid to his issue, if he should leave any, and if not, a limitation over, it was held that the provision for the son was inalienable by him, and could not be reached by his creditors. *Clute v. Bool*, 8 Paige, 83. It is very evident, therefore, that a provision for children or others by way of restriction upon alienation may legally be made by any one in his last will, if only done in the form of a trust. But the English cases seem to require that it should be done in a specific form, in order to protect the trust-property from the effect of the bankrupt law; i.e., that the instrument creating the trust should provide that the interest of the donee shall cease upon his becoming bankrupt, and shall, therefore, be paid to some other one. *Yarnold v. Moorhouse*, 1 R. & M. 364; *Manning v. Chambers*, 1 DeG. & S. 282; *Sharp v. Cosserat*, 20 Beav. 470; *Dommett v. Bedford*, 6 T. R. 684; 3 Ves. 149; *Graves v. Dolphin*, 1 Sim. 66; *Brandon v. Robinson*, 18 Ves. 429. These cases seem to rest upon no satisfactory basis of equity or justice, but solely upon the extreme views of policy which the English courts have felt called upon to apply to their bankrupt law, a principle which, so far as we know, has never obtained here, certainly not to the same extent. All that justice or the practice in this country would seem to require is, that the donation should be in trust, and clearly declare that the cestui que trust should have no interest in the fund or income, and no power to anticipate the latter, or assign either, but that it be held and applied solely for his support and that of his family, which a court of equity will enforce. *Easterly v. Keney*, 36 Conn. 18. But, to save all question, it will be

42. It has been held that a devise in fee to the grandson of the testator, with a direction in a codicil that the estate be held by trustees, "in trust to pay over to him quarterly the net income of said estate, so long as he shall remain unmarried, and in the event of his marriage, or dying unmarried, to convey the estate to his heirs," was a condition in restraint of marriage, and against the policy of the law; and that the gift over was void, the entire estate having vested in the first donee, as the condition was subsequent; and there being no valid gift over, since no one can have heirs capable of taking an estate, as such, while the ancestor is still living.⁹⁴

43. A devise upon condition that the devisee shall "comply with what is enjoined upon him in this will," is, *prima facie*, upon condition that the devisee shall also comply with what shall be enjoined upon him in any codicil to the will.⁹⁵

44. A restriction upon the devisee, who had lived a long time in the testator's family, against alienation of the estate to any except

more prudent to adopt the form required by the English cases under the English bankrupt law. Ante, n. 35. The form of the assignment under the English bankrupt law extends to future interests. This question has just been decided (1876) by the national Supreme Court, in *Nichols, Assignee, v. Eaton* (not yet reported in the regular series); and the English rule, as stated in *Brandon v. Robinson*, 18 Ves. 429, 433, and other cases before cited in this note, were distinctly repudiated. Mr. Justice *Miller*, in declaring the opinion of the court, says: "We do not see any reason, in the recognized nature and tenure of property and its transfer by the will, why a testator who gives without any pecuniary return, who gets nothing of property-value from the donee, may not attach to that gift the incident of continued use, of uninterrupted benefit of the gift, during the life of the donee. Why a parent, or one who loves another, and wishes to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of the future, and even his own incapacity for self-protection, should not be permitted to do so, is not readily perceived." The court cite many American cases in support of this view: *Shankland's Appeal*, 47 Penn. St. 113, and other cases from that state; *Campbell v. Foster*, 35 N. Y. 361; *Pope's Ex'rs v. Elliott*, 8 B. Mon. 56; *Leavitt v. Beirne*, 21 Conn. 1; *Nickell v. Handly*, 10 Gratt. 336. Thus the rule for which we have so long contended, in various forms and numerous places not needful to repeat here, has finally been declared to be founded in the most unquestionable principles of justice and legal equity by the court of highest authority in the land upon the law of bankruptcy and its kindred remedies. The question may, therefore, be regarded as finally at rest in this country.

⁹⁴ *Otis v. Prince*, 10 Gray, 581; *Heard v. Horton*, 1 Denio, 165.

⁹⁵ *Tilden v. Tilden*, 13 Gray, 103

the heirs of the testator, was held to be personal to the first devisee ; and that one of the heirs of the testator, to whom the devisee had conveyed the same, would take it free from all restriction upon the title.⁹⁶

* 45. A condition attached to a devise, that the testator's * 303 son, the beneficiary, "acquire a good education, and by good conduct and steady habits until the age of twenty-one," &c., is not void for uncertainty, as its performance may be judicially ascertained ; and if imperfectly or ungrammatically expressed, it is nevertheless intelligible.⁹⁷

46. Where the will imports a present interest in the devisee, it is to be construed so that any condition in the same shall be held subsequent, and not precedent.⁹⁸

47. A will, clearly expressed, must receive the interpretation the words compel ; and conditional limitations, contingent upon some

⁹⁶ *McKinster v. Smith*, 27 Conn. 628. It was held at an early day in this state, that a devise of real estate to the testator's widow, so long as she should remain unmarried, was valid upon the ground that the rule against conditions in restraint of marriage was not applicable either to real estate or to a widow. *Phillips v. Medbury*, 7 Conn. 568. And the same doctrine is maintained in *Hughes v. Boyd*, 2 Sneed, 512. And the attempt to create a remainder, dependent upon the failure of the first donee to dispose of the estate, such donee having by the will the absolute power to do so, is inoperative. *Sevier v. Brown*, 2 Swan, 112. So the attempt to so frame a bequest that it may be construed either a gift or a loan, as the beneficiary shall secure the property against ever coming to the use of certain proscribed persons or their heirs, is invalid ; and the donee may dispose of the estate, by will or otherwise, to the persons excluded by the will, or others, in her discretion. *Williams v. Jones*, 2 Swan, 620. Bequest of a yearly sum to the testator's widow, upon condition that if she shall marry again the same shall cease, is a valid condition. *Cornell v. Lovett*, 35 Penn. St. 100. So an absolute prohibition of marriage of the devisee is reasonable and lawful, and is a valid condition subsequent, the non-performance of which will defeat the estate. But, if the devisee should also be heir to the estate, he cannot be held to have forfeited the same under the will, until it appear that the breach of the condition was committed with full knowledge of the condition ; for, being in possession as heir, he cannot forfeit the estate under the will until he is aware of its requirements. *Shackleford v. Hall*, 19 Ill. 212 ; *Kenrick v. Beaucherk*, 11 East, 657 ; *Taylor v. Crisp*, 8 Ad. & Ell. 779. Where the condition is the payment of a legacy charged upon the land devised, and the legatee predeceases the testator, the devise takes effect at the decease of the testator absolutely, the legacy having lapsed. *Woods v. Woods*, Busbee, Law, 290.

⁹⁷ *West v. Moore*, 37 Miss. 114.

⁹⁸ *Bell County v. Alexander*, 22 Texas, 350.

specified event, take effect only upon the occurrence of the precise event designated.⁹⁹

48. It seems to be settled, as before stated, that devises of real estate upon conditions in restraint of marriage are valid in * 304 * Pennsylvania.¹⁰⁰ And this is so without a limitation over.¹⁰¹

But a bequest to a woman, of an annual sum, cannot be restrained by a condition subsequent upon her marriage where there is no gift over, but may be by a conditional limitation.¹⁰²

49. We have before stated, that if a legatee upon condition accept the legacy, and enter into possession, he must perform the condition, however burdensome. But he is not bound to make his election until the condition and the value of the gift are rendered reasonably certain. And it is not sufficient to bind the legatee to the performance of the condition, that he had formed the purpose of accepting the bequest: he may retract such purpose, upon obtaining clearer knowledge of the facts, at any time before actual acceptance.¹⁰³

50. The question of the nature and extent of the responsibility incurred by accepting a devise given upon condition is extensively and learnedly discussed by *Davies, J.*, in *Gridley v. Gridley*, and the authorities, both English and American, extensively commented upon.¹⁰⁴ The point here decided is, that where a will gave all the testator's real and personal estate, and declared the donee was to pay all the testator's debts and a certain annuity, the acceptance of the gift creates a personal liability, upon which an action can be maintained at law, without any express promise.¹⁰⁵

51. In a recent English case,¹⁰⁶ where the testator gave his

⁹⁹ *Taylor v. Wendel*, 4 Bradf. Sur. Rep. 324.

¹⁰⁰ *Commonwealth v. Stauffer*, 10 Penn. St. 350.

¹⁰¹ *McCullough's Appeal*, 12 Penn. St. 197. See also *Bennett v. Robinson*, 10 Watts, 348; *Fahs v. Fahs*, 6 Watts, 213; *Stahl's Appeal*, 2 Penn. St. 301.

¹⁰² *Hoopes v. Dundas*, 10 Penn. St. 75; *Middleton v. Rice*, 6 Penn. L. J. 229; *Binnerman v. Weaver*, 8 Md. 517.

¹⁰³ *Wheeler v. Lester*, 1 Bradf. Sur. Rep. 293.

¹⁰⁴ 24 N. Y. 130; s. p. *Messenger v. Andrews*, 4 Russ. 478; *Rees v. Engelback*, L. R. 12 Eq. 225.

¹⁰⁵ The cases referred to by the learned judge are the following among others: *Spraker v. Van Alstyne*, 18 Wend. 200; *McLachlan v. McLachlan*, 9 Paige, 534; *Lord v. Lord*, 22 Conn. 595, 602; *Parish v. Whitney*, 3 Gray, 516.

¹⁰⁶ *Walker v. Walker*, 2 DeG., F. & J. 255. But the rule will not be

eldest son a legacy of £500, on condition that he conveyed a certain estate to another son within six months after request, otherwise the legacy to become void, and the testator after the date of the will purchased all the legatee's interest in the estate for £300, it was held that the legatee was entitled to the £500, discharged of the condition. But where the legacy was upon condition that the legatee married the testator's niece E., and the testator

* subsequently consented that he might marry another wo- * 305 man, it was held to be a condition precedent, and, not being performed, the legacy failed,¹⁰⁷ notwithstanding the testator's consent to the marriage in disregard of it.

52. The testator gave to his wife the income of certain real and personal estate, and directed that upon her death the same should be converted into money and paid over to a charitable society, on condition that it should keep his burial-place in repair in the mode prescribed in the will. This was done by the widow during her life. Two years after her decease, and as soon as the society knew of the bequest, they voted to accept it, and assumed the performance of the condition. The heirs claimed to hold the property, on the ground that the society were bound to keep the burial-place in repair from the time of the interment. The court held that the performance of the condition was sufficient, and that the society was entitled to hold the property.¹⁰⁸

53. The testator devised his property to his widow during life, and, after her decease, to his adopted son, provided he should remain a faithful son. He lived with the testator until his decease, and with the widow until she broke up housekeeping, and was always a faithful son. After this, being nine years old, by an arrangement between the widow and his father he returned to and lived with him until after the decease of the widow; and in the mean time, by mutual arrangement between the father and the widow, the articles of apprenticeship, by which he went to live with the testator at three years of age, had been cancelled. All this was

extended to cases when advancements to one child were required to be brought into hotchpot. *Middleton v. Windross*, L. R. 16 Eq. 212.

¹⁰⁷ *Davis v. Angel*, 8 Jur. n. s. 709, before the Master of the Rolls; affirmed by the Lord Chancellor, 8 Jur. n. s. 1024; s. c. 10 W. R. 685, 722.

¹⁰⁸ *Eliot v. Eliot*, 10 Allen, 357. See also *Johnson v. Foulds*, Law Rep. 5 Eq. 268.

done without consulting the son. It was held that none of these acts were in violation of the condition.¹⁰⁹

54. The cases are considerably numerous in the late English reports where property is devised during life, provided the devisee do no act to deprive himself or herself of the use and control of the income of the estate. In such cases it has been held that bankruptcy, voluntary or involuntary, will work a forfeiture of the * life-interest.¹¹⁰ So also when a creditor by judgment obtains a charging order.¹¹¹ And the marriage of the widow, without having made a settlement, will have this effect.¹¹² So a devise or bequest "if the legatee is not an uncertificated bankrupt at my death," who was a bankrupt at that time, but his bankruptcy was annulled four months later, was held to give no legacy.¹¹³ But a condition against alienation before the devisee in fee shall attain thirty-five is void.¹¹⁴

55. In the case of *Martin v. Martin*,¹¹⁵ Vice-Chancellor Wood held, that where a bequest was made to the testator's nephews and nieces, of a mixed fund, to be equally divided among such of their children as should survive them, and if any or either of his nephews or nieces died before him, *or before they should actually have received what was to go to them*, their share should be divided equally among their children, that the latter condition could not be annexed to a gift to take effect immediately, but that those nephews and nieces who survived the testator took absolute interests. But it was here considered that this clause in the will, although incapable of becoming operative in the form in which it stood, might be referred to by the court in fixing the construction of the will, and preventing the adoption of any other construction which the law will uphold.

¹⁰⁹ *Wells v. Wells*, 37 Vt. 483. See *Harris v. Hearne*, 2 Winst. Eq. 92; *Reeves v. Craig*, 1 Winst. Law, 209.

¹¹⁰ *Pearson v. Dolman*, Law Rep. 3 Eq. 315. But a decree of bankruptcy revoked or annulled will not have this effect. *Lloyd v. Lloyd*, L. R. 2 Eq. 722. See *Parnham's Trusts*, L. R. 13 Eq. 413; *White v. Chitty*, 1 id. 372; *In re Amherst's Trusts*, 13 id. 464.

¹¹¹ *Roffey v. Bent*, Law Rep. 3 Eq. 759.

¹¹² *Craven v. Brady*, Law Rep. 4 Eq. 209.

¹¹³ *Cox v. Fonblanque*, Law Rep. 6 Eq. 482.

¹¹⁴ *Twitty v. Camp*, 1 Phillips, Eq. (N. C.) 61.

¹¹⁵ 12 Jur. N. S. 889; s. c. 14 W. R. 986.

56. Where the testator by his will made a specific disposition of his "home-place," and subsequently sold the same for \$10,000, taking notes and giving a contract to convey upon the payment of the price, and thereupon made a codicil to his will directing the price of the home-place to be invested in the purchase of another place by his executor, and directing by whom the latter should be held and enjoyed; afterwards received a payment of \$2,500 towards the price of the home-place, and paid out the same, and died before the remainder was paid, the purchaser having become insolvent; it was held that the payment and disposition of the \$2,500 adeemed * so much of the specific devise of the "home- * 307 place," and to that extent rendered the carrying into effect of the codicil impracticable, in the event of the purchaser making full payment and compelling the conveyance; but if he failed to do so, the original provisions of the will should be carried into effect, and the codicil remain inoperative.¹¹⁶

57. In a recent English case,¹¹⁷ the testator devised certain personal estate to his widow during life, and after her decease to the defendants "for the purpose of founding in it a new professorship of archæology, for the regulation of which I purpose preparing a code of rules and regulations which I intend to authenticate under my hand." It was also provided that the executors, immediately after the testator's decease, should communicate the bequest and a copy of such rules and regulations to the defendants; and unless the defendants, within twelve calendar months, should signify in writing "their acceptance of the said rules," &c., the said bequest "shall be wholly null and void." The testator failed to prepare any such rules; and the court, reversing the decision of the Vice-Chancellor, held that the bequest took effect, subject to the compliance with the provision of the will in regard to the acceptance of the rules, which, being in the nature of a condition subsequent,

¹¹⁶ *Whitlock v. Vaun*, 38 Ga. 562. The decision seems an exceedingly sensible and practical one. But if the strictest rule of technical law had been applied to it, there might have been found, probably, some ground to treat the sale of the estate as a revocation of that portion of the will; and the price not having been paid, there might have been some possible ground of raising a doubt in regard to the rights of the residuary legatees and the specific devisees under the codicil; but a modicum of good sense applied to the construction, enabled the court to escape all question.

¹¹⁷ *Yates v. University College, London*, L. R. 8 Ch. App. 454; affirmed, L. R. 7 Ho. Lds. 438.

and its performance being rendered impossible by the act of the testator, could not defeat the operation of the bequest, which the defendants would take unconditionally.

58. A legacy given upon the express condition, that if the same is not claimed by the legatee within three calendar months after the decease of the testator, "then the bequest should lapse, and the amount fall into and be considered part of the residuary estate," will lapse if not so claimed by the legatee, even when she was ignorant of the bequest and of the decease of the testator.¹¹⁸

SECTION IV.

WHAT WORDS WILL CARRY REAL ESTATE.

1. The words "estate" and "property" generally sufficient to pass real estate.
2. But the word "effects" will not produce that result, unless qualified. §
3. Enumeration of some cases illustrating the preceding rules.
4. To restrict the word "estate" to personalty, there must be a clear expression of intention.
5. It will not have that effect even when associated with words descriptive of personalty only.
6. Cases illustrative of the last preceding rule.
7. Strong case of departure from the maxim, *ejusdem generis*.
8. The early rule was to construe these general terms according to their association.
9. Sometimes an enumeration of particulars following the words may limit the sense.
10. Explanation of some cases where general words in a codicil were restricted.
11. These general words now held to include realty, unless the contrary appear.
12. A devise to the person made executor receives the same construction as one to any other person.
13. Some cases have restricted those general terms by the import of relative terms following.
14. But the rule is now established that such words should have their natural force.
15. Some few cases seem to favor the former construction.
16. Sir *J. Romilly* favors that view, to some extent.
17. Some of the cases have made a distinction between the devise and the accompanying trusts.
18. Entirely general terms, having no special application to real estate, will pass the title.

¹¹⁸ *Powell v. Rawle*, 22 W. R. 629; s. c. L. R. 18 Eq. 243. The counsel here refer to *Burgess v. Robinson*, 3 Mer. 7; *Davis v. Angel*, 10 W. R. 722; 31 Beav. 223.

- * 19. But some few cases have attempted to restrict the application of such terms. * 308
- 20. It sometimes happens that words appropriate to personalty may carry realty.
- 21. "Legacy" and "residuary legatee" used with reference to real estate.
- 22. Even terms of an exclusively personal import may carry real estate.
- 23. The courts in America follow the English cases upon these questions. New York.
- 24. The same rule prevails in Massachusetts.
- 25. So also in Connecticut.
- 26. And in the Circuit Court; and in Maine.
- 27. "All my real and personal estate" ought to embrace an interest as mortgagee.

§ 19. 1. THE words "estate" and "property," when used in a will, in a general sense, have commonly been held sufficient to embrace all the testator's property, real and personal.¹ In this case the expression was "all the rest and residue of my moneys, goods, chattels, and estate whatsoever;" and the case is placed by Lord *Hardwicke* upon the ground that the words preceding "estate" were sufficient to carry every species of personalty, and therefore that word must have been intended to carry real estate, or else it would have no effect. This general rule has been followed in all the subsequent cases, most of them occurring in regard to a bequest of the residuum of the estate, where the courts have always manifested a strong reluctance to adopt any construction which would result in even a partial intestacy.²

2. The word "effects," although more naturally having reference to personal estate, will carry real estate, when used with the word "real," as "all the effects, both real and personal, which I shall die possessed of."³ But the word "effects" without the

¹ *Tilley v. Simpson*, 2 T. R. 659, n. See *Jongsma v. Jongsma*, 1 Cox, 362; *Rashleigh v. Master*, 1 Ves. Jr. 201; *Pitman v. Stevens*, 15 East, 505. But where the words "all the rest of my estate and effects" were used with reference to a bequest in trust for accumulation, and interest directed to be added to principal for that purpose alone, the only freehold interest of the testator was held not to pass. *Doe v. Buckner*, 6 T. R. 610.

² *Terrel v. Page*, 1 Ch. Cas. 262; s. c. 1 Eq. Cas. Ab. 209, pl. 11, where the language is very similar to that of the last preceding case. *Scott v. Alberry*, 1 Com. 337; s. c. 8 Vin. Ab. 228, pl. 14. See also *Awbrey v. Middleton*, 4 Vin. Ab. 460, pl. 15; s. c. 2 Eq. Cas. Ab. 497, pl. 16. See also, to the same effect, *Jongsma v. Jongsma*, 1 Cox, 362; *Smith v. Coffin*, 2 H. Bl. 444; *Doe d. v. Gilbert*, 3 Br. & B. 85; *Churchill v. Dibben*, 9 Sim. 447, n; *King v. Shives*, 4 Moo. & S. 149; s. c. 5 Sim. 461.

³ *Hogan v. Jackson*, 1 Cowp. 299; s. c. 3 Br. P. C. 388; *Lord Torrington v. Bowman*, 22 L. J. Ch. n. s. 236.

word "real," even when followed by the words, "of what nature, kind, or quality soever," will not carry real estate.⁴

* 309 * 3. In *Grayson v. Atkinson*,⁵ the words of the devise were, as to all the rest of my "goods and chattels, real and personal, movable and immovable, as houses, gardens, tenements," &c.; and Lord *Hardwicke* held it sufficient to carry a fee. But without the enumeration of "houses," &c., he thought it might not have been sufficient for that purpose. And in another case the word "estates" was held sufficient to carry the reversion of a freehold interest of inheritance, although the same word had been before used by the testator, as applicable to other estates than the one now in question.⁶ The expression, "goods and chattels, rights, credits, personal and *testamentary estate*," was held sufficient to pass land.⁷

4. So also the word "property," in a residue, has been held sufficient to carry a fee.⁸ So also in another case the expression, "all other his property whatsoever and wheresoever."⁹ A leading opinion upon this point was delivered by Lord *Brougham*, in *Mayor of Hamilton v. Hodsdon*.¹⁰ His lordship said, in substance, that "estate" meant both realty and personalty, and that realty was not to be excluded because there was personalty upon which it might operate; that where realty was meant to be excluded, the testator had used the words *personal estate*; and that, to restrict the word "estate" to personalty, there should be a clear expression of intention to that effect.

5. In most of the cases above referred to, the words "estate" or "property," which were held to embrace real estate, were preceded by particular devises of real estate; but that circumstance, although favoring the more enlarged import of such general words, is not essential to that construction. But the word "estate" may pass realty, when not preceded by any particular devise

⁴ *Camfield v. Gilbert*, 3 East, 516; *Doe d. White*, 1 East, 33; *Macnamara v. Whitworth*, Coop. 241; *Doe d. v. Dring*, 2 M. & Sel. 448; *Doe d. v. Earles*, 15 M. & W. 450.

⁵ 1 Wilson, 333.

⁶ *Fletcher v. Smiton*, 2 T. R. 656.

⁷ *Smith v. Coffin*, 2 H. Bl. 444; *Doe d. v. Gilbert*, 3 Br. & B. 85; *Doe d. v. Walker*, 15 Q. B. 28.

⁸ *Doe d. v. Lainchbury*, 11 East, 290.

⁹ *Edwards v. Barnes*, 2 Bing. N. C. 252.

¹⁰ 6 Moore's P. C. C. 76.

of real estate, and even when associated with words comprehending only personalty.

6. Thus, in *Tanner v. Morse*,¹¹ "the residue of my *estate*, goods * and chattels," was held to carry real estate; and in * 310 *Doe d. v. Langlands*,¹² the residue of my "property, goods and chattels," received the same construction. So also "all my property and effects."¹³ And a similar construction has prevailed in other cases.¹⁴

7. The case of the devise of all the testator's "money, goods, chattels, *estates*, and effects of what nature and kind soever, and wheresoever the same might be at the time of his decease," was held sufficient to pass real estate.¹⁵

8. The old rule in regard to the construction of the words "estate," "property," &c., which are susceptible of being used with exclusive reference to personalty, or as including both real and personal estate, was to restrict their operation to personalty merely, unless there was something positive in the case tending to show that the terms were used in a more enlarged sense.¹⁶ It was accordingly held in a large number of the earlier cases, extending over a considerable period of time, that these general words, when used in connection with other words importing only personal estate, should be restricted to property *ejusdem generis*, according to the maxim, *Noscitur a sociis*; thus in effect deciding precisely contrary to the rule of construction adopted in most of the cases already named.¹⁷

¹¹ *Cas. t. Talbot*, 284; *Lumley v. May*, *Prec. in Ch.* 37.

¹² 14 *East*, 370.

¹³ *Doe d. v. Morgan*, 6 B. & Cr. 512; s. c. 9 D. & Ry. 633; *Bradford v. Belfield*, 2 Sim. 264.

¹⁴ *Doe d. v. Evans*, 9 Ad. & Ell. 719; *D'Almaine v. Moseley*, 1 Drew. 633. It is here said, that the want of any previous devise of real estate, or the expression "wheresoever situated," are not important in fixing the construction of the word "estate," in the former case to real estate, and in the latter to personalty.

¹⁵ *Midland Counties Railway v. Oswin*, 1 Coll. C. C. 74; *Footner v. Cooper*, 2 Drew. 7; *O'Toole v. Browne*, 3 Ell. & Bl. 572; *Patterson v. Huddart*, 17 Beav. 210; *Meeds v. Wood*, 19 id. 215; *Re Greenwich Hospital*, 20 id. 458; *Hawksworth v. Hawksworth*, 27 Beav. 1; *Church v. Mundy*, 15 Vesey, 396, 406.

¹⁶ *Trevor*, Ch. J., in *Shaw v. Bull*, 2 Eq. Cas. Ab. 320, 321.

¹⁷ *Wilkinson v. Merryland*, Cro. Car. 447; *Cliffe v. Gibbons*, 2 Ld. Ray. 1324; 2 Eq. Cas. Ab. 301, pl. 17; *Marhant v. Twisden*, Gilb. Eq. Cas. 30;

9. In many of the cases where the general terms "estate" or "property" have been restricted to personalty, it has been done upon the ground that the will contained an enumeration of particulars, following these general terms, which tended to show that they were intended to be understood in this restricted sense.¹⁸

10. There is a class of cases, not very numerous, where in the principal will a particular devise of real estate is made, and in a codicil a residuary clause is contained giving all the residue of the testator's "estate, property," &c., to another person, where it has been held that the former clear devise could not be cut down by such general expressions.¹⁹ But these cases stand upon peculiar, and, as we think, unquestionable grounds; that the codicils and the will are all to be construed together, as constituting the entire testamentary act. The word "rest" would therefore properly include only such estate as had not been before specifically disposed of.

11. But we understand that the general rule of construction in regard to the import and extension of the words "estate," "property," &c., is now settled, as already stated, and that it is now considered that these terms shall be regarded as intended to include real estate, unless there is something in the will, which, with reference to such surrounding circumstances as are properly admissible in aid of the construction, fairly justifies the conclusion, that they were not intended to be used in that enlarged sense.²⁰

12. Some of the earlier cases have assumed to regard the words "estate," "property," and the like, as applicable exclusively to personal estate, because the legatee was also named executor, whose office is confined to personalty, exclusively, in England.²¹

Doe d. v. Rout, 7 Taunt. 79; *Barnes v. Patch*, 8 Ves. 604; *Woollam v. Kenworthy*, 9 Ves. 137; *Bebb v. Penoyre*, 11 East, 160; *Chapman v. Prickett*, 6 Bing. 602; *Acheson v. Fair*, 3 D. & War. 512. See also *Sanderson v. Dobson*, 1 Exch. 141, upon which the Court of Common Pleas differed from the Court of Exchequer. *Lord Campbell*, in *O'Toole v. Browne*, 3 Ell. & Bl. 572.

¹⁸ *Timewell v. Perkins*, 2 Atk. 102; *Roe d. v. Yeud*, 2 B. & P. N. R. 214; *Doe d. v. Rout*, 7 Taunt. 79.

¹⁹ *Molyneux v. Rowe*, 25 L. J. Ch. N. S. 570, which was a hearing in the Court of Chancery Appeal.

²⁰ 1 Jarman (Eng. ed. 1861), 692; *Bayley, J.*, in *Doe v. Morgan*, 6 B. & Cr. 512; *Patterson v. Huddart*, 17 Beav. 210.

²¹ *Shaw v. Bull*, 12 Mod. 592; s. c. 2 Eq. Cas. Ab. 320, pl. 8, where the expression is "overplus of my estate."

But the last case is clearly not reconcilable, either with principle, or with the general current of the authorities. And the case of *Piggot v. Penrice*,²² where the phrase, "executrix of all my goods, lands, and chattels," was held not to pass real estate, but to be restricted to leaseholds, even where the testator had no such, has not * been regarded as maintainable upon any just * 312 rules of construction, and is virtually overruled by *Doe d. v. Gillard*,²³ where the terms, "executor of my lands, for ever, and leasehold property," were held to pass the testator's freehold estates. The rule of construction as affected by the word "executor" could never have had any such application in this country as has been claimed for it in some of the English courts, since the probate of the will here generally affects real as well as personal estate, and the executor may dispose of real estate in payment of debts, when required for that purpose. We do not consider the rule has any foundation anywhere.²⁴ For in a recent case²⁵ it was held, upon an extensive review of the authorities, that a devise to the executor of "all his houses and land at F." passed an estate in fee of all the testator's lands at that place. But the form of expression here used, "I hereby appoint W. P. whole and sole executor of all my houses and lands," &c., although held to amount to a devise, has in other cases, as applied to personalty, been held to create no beneficial interest in the executor.²⁶

13. Some of the early cases held, where the testator used general words, such as "all my estate, property," &c., and followed them by expressions such as "interest," "dividends," "capital," and others, having more specific application to personal estate, and not legitimately and strictly applicable to real estate, that the general terms were thereby restricted in their operation, so as not to include freehold interests in lands.²⁷ But there are many other

²² *Prec. in Ch.* 471; *s. c.* 1 *Eq. Cas. Ab.* 209, pl. 13.

²³ 5 *B. & Ald.* 785; *Marret v. Sly*, 2 *Sid.* 75.

²⁴ *Noel v. Hoy*, 5 *Madd.* 38, where the devise was to the testator's wife, whom he made executrix "of all the property of whatever description or sort that I may die possessed of," and was held to pass lands. The same construction prevailed in *Thomas v. Phelps*, 4 *Russ.* 348.

²⁵ *Doe d. v. Pratt*, 6 *Ad. & Ell.* 180. See also *Hickman v. Haslewood*, *id.* 167; *Day v. Daveron*, 12 *Sim.* 200.

²⁶ *Juler v. Julor*, 30 *Law J. Ch.* 142.

²⁷ *Doe d. v. Buckner*, 6 *T. R.* 610; *Doe d. v. Hurrell*, 5 *B. & Ald.* 18; *Pogson v. Thomas*, 6 *Bing. N. C.* 337.

contemporary cases where this rule of restriction was not adopted.²⁸ Some have attempted to make a distinction, in regard to the allowance of this restriction, as to whether the testator professed in terms, in his will, a determination to dispose of his whole estate; as if in the latter case there was more necessity of

* 313 * giving such general expressions an extended operation than when no such determination was expressed in the will, in order to carry out the testator's expressed intention.²⁹ But it is apparent that such a suggestion is entitled to very little weight, since ordinarily, when a man sits down deliberately to make his will, he professes, by the very act, a determination to dispose of all his property, and not to die intestate in regard to any portion of it, just as much as if he had so declared in the most explicit terms.³⁰

14. But these conflicting opinions are all put to rest by the more recent decisions. It seems to be now clearly settled that these general expressions, such as the "residue of my property, or estate," shall be received and understood in their ordinary sense, and operate upon both real and personal estate, even when terms are afterwards used with reference to such bequest, which more naturally apply to personal property, such as "interest," "capital," "dividends," &c., unless there is something to show plainly that they were intended to be received in a different sense.³¹ Lord *Eldon's* language in *Church v. Mundy*³² is here applicable, as it is always and everywhere: ³³ "It is much more safe to consider those subjects intended, which the words describe, than to supply a purpose by conjecture;" "The best rule of construction is that which

²⁸ *Doe d. v. Chapman*, 1 H. Bl. 223.

²⁹ 1 Jarman, 699.

³⁰ *Sadler v. Turner*, 8 Vesey, 617, 623. Sir *Wm. Grant*, M. R., said, "The expression of intention alone will not do, unless some words actually disposing of the property can be found." See also *Gulliver v. Poyntz*, 3 Wils. 141; *Smith v. Coffin*, 2 H. Bl. 450; *Grayson v. Atkinson*, 1 Wils. 333; *Bradford v. Belfield*, 2 Sim. 264; *Sutton v. Sharp*, 1 Russ. 146; *Roe v. Yeud*, 5 B. & P. 214; *Doe v. Rout*, 7 Taunt. 79, 84.

³¹ *Saumarez v. Saumarez*, 4 My. & Cr. 331. The same rule is followed in *Morrison v. Hoppe*, 4 DeG. & S. 234, and in *Stokes v. Salomons*, 9 Hare, 75; *Mayor of Hamilton v. Hodsdon*, 6 Moo. P. C. C. 76; *Streatfeild v. Cooper*, 27 Beav. 338.

³² 15 Vesey, 396, 406.

³³ *Semper, ubique, ab omnibus.*

takes the words to comprehend a subject that falls within their usual sense, unless there is something like declaration plain to the contrary."

15. There is, however, an occasional case, where the old rule upon this point seems to have been followed, and the legitimate signification of the words, "all my estate, effects, and property," have been restricted by the use of such relative terms as "*principal*," * "*legacy*," "*balance*," and by the shares of * 314 those entitled being made payable by the testator's "legal personal representatives," "executors," or "the survivors." Sir *John Romilly*, M. R.,⁸⁴ in *Coard v. Holderness*,⁸⁴ placed stress upon the absence of all words peculiarly applicable to real estate, as "heirs," "devise," "rent," and on the limitation to executors or administrators, and on the use of the other terms named, and on the authority of *Doe d. v. Buckner*.⁸⁵

16. Sir *John Romilly*, M. R.,⁸⁵ seems to have considered the case of *Saumarez v. Saumarez*⁸¹ as a very strong case, and to have sometimes manifested a willingness to have it qualified to some extent; but there seems no ground to question that the true principle is more fairly exemplified in that case than in those which have attempted to overrule or qualify it.

17. In some cases the words of the devise have been held sufficient, by means of their generality, to pass real estate; but the words of the accompanying trusts were so exclusively confined to personalty, that it has been considered that the devisee held the legal estate, as trustee, for the heir, and that the trusts declared only attached to the personalty.⁸⁶ It is, perhaps, scarcely necessary to add, that any such splitting up of a case is sure to go one side of the intent of the testator. It is scarcely possible to suppose that where a general devise of real and personal estate is

⁸⁴ 1 Jur. N. S. 316; S. C. 20 Beav. 147; *Doe v. Buckner*, 6 T. R. 610. See also *Lloyd v. Lloyd*, L. R. 7 Eq. 458. But it was said by *Kindersley*, V. C., in *Fullerton v. Martin*, 22 Law J. Ch. N. S. 893, 894, that this last case would have been decided differently at the present day, and that the grounds of the opinion of Lord *Kenyon* would not now be held sufficient.

⁸⁵ *Meeds v. Wood*, 19 Beav. 215, 224.

⁸⁶ *Dunnage v. White*, 1 Jac. & W. 583. Mr. Jarman observes, in regard to this case, that it appears that there was no real estate, the title of which had been so far perfected in the testator at the date of his will, that, as the law then stood, it could pass under it. 1 Jarman, 680. See also *id.* 602, 603, and note.

made to trustees, to perform certain trusts declared in the will, that the trusts were intended to apply only to a portion of the estate, and that the trustee was to hold the balance for a totally different purpose.³⁷

* 315 * 18. In some cases very general forms of expression, and such as have no natural aptness for the purposes, have been held sufficient to pass real estate. As in *Hopewell v. Ackland*,³⁸ where the expression "whatever else I have in the world not before disposed of" to A., "he paying my debts and legacies," was held sufficient to pass an estate in fee. And in *Huxtep v. Brooman*,³⁹ the words, "all I am worth," was considered to have the same operation. And this case, although questioned by Lord *St. Leonards* while Chancellor of Ireland,⁴⁰ has been referred to with approbation in several subsequent cases, and some of comparatively late date.⁴¹ And similar forms of expression have been repeatedly held sufficient to pass real estate, such as "all I have," "all I am worth,"⁴² "every thing else I die possessed of."⁴³ So also "I appoint my wife executrix and residuary legatee to all other property I may possess at my decease."⁴⁴

19. But there are some few exceptional cases where these general forms of expression have been held not to carry real estate, as

³⁷ The word "devise," when used by even tolerably careful draughtsmen, is not always used with precision. Hence it has been decided that, as applied to the word "effects," it will not carry real estate. *Camfield v. Gilbert*, 3 East, 516. Lord *Ellenborough* here considered that the word "effects," standing alone in its natural signification, means "personal effects." In *Hogan v. Jackson*, 1 Cowp. 299, the word "real" was used in connection with "effects," and it was held sufficient to pass realty on that account. So the word "bequeath," as applied to a term sufficient to carry realty, will not restrict its operation to personalty. *Whicker v. Hume*, 14 Beav. 509.

³⁸ 1 Salk. 239; s. c. 1 Com. 164.

³⁹ 1 Br. C. C. 437. And in *Taylor v. Web*, Sty. 301, 307, 319, *Marret v. Sly*, 2 Sid. 75, the expression, "I make A. my sole heir," was held to pass the testator's real estate.

⁴⁰ *Wills v. Wills*, 1 Dr. & War. 439.

⁴¹ *Doe d. v. Rout*, 7 Taunt. 79; *Davenport v. Coltman*, 9 M. & Wels. 481. Lord *Cranworth*, Baron *Rolfe*, here said of the case of *Huxtep v. Brooman*: "The authority of that case has never been questioned."

⁴² Justice *Bayley*, in *Doe d. v. Morgan*, 6 B. & Cr. 512, 518.

⁴³ *Wilce v. Wilce*, 7 Bing. 664. See also *Phillips v. Beal*, 25 Beav. 25.

⁴⁴ *Day v. Dameron*, 12 Sim. 200. And a very similar expression in *Davenport v. Coltman*, 9 M. & W. 481, s. c. 12 Sim. 588, was held to have a similar effect.

"all I may die possessed of at the time of my death."⁴⁵ It was here urged by the court that the expressions "possessed of," and especially "at the time of my death," must have had reference to personal estate, which we confess does not strike us with much force. So the expression "all my effects" was confined to personalty, and with more propriety, as it seems to us.⁴⁶ So also the term "my fortune."⁴⁷

* 20. It often occurs that words appropriate to the descrip- * 316
tion of personal estate, by force of the context, are held to include land, as in *Hope d. v. Taylor*,⁴⁸ where the word "legacy" was held to refer to real estate antecedently given.

21. So the word "legacy," although strictly applicable to personalty only, may be used with reference to antecedent bequests embracing both real and personal estate.⁴⁹ And the term "residuary legatee," although strictly applicable to personalty,⁵⁰ has come to be used pretty generally with reference to the person taking the entire residuum of both real and personal estate.⁵¹

22. And the word "effects" is often used in such juxtaposition in an instrument as to show that it was intended to embrace real as well as personal property. As the words "said effects" have been held to refer to land previously given,⁵² so the expression "worldly goods," by the force of the context has been held to pass real estate.⁵³ And it has even been held that the term "personal estates" in a will may have the effect to pass real property, where it is manifest, from the whole of the instrument, that such was the

⁴⁵ *Monk v. Mawdsley*, 1 Sim. 286.

⁴⁶ *Henderson v. Farbridge*, 1 Russ. 479.

⁴⁷ *Maitland v. Adair*, 3 Vesey, 231.

⁴⁸ 1 Burr. 268.

⁴⁹ *Hardacre v. Nash*, 5 T. R. 716. Upon the general question of applying such terms as "share," "portion," &c., to antecedents embracing different subjects, see *Doe d. v. Stopford*, 5 East, 501; *Hardman v. Johnson*, 3 Mer. 347; *Doe d. v. Gell*, 2 B. & Cr. 680; *Doe d. v. Bowling*, 5 B. & Ald. 722; *Scrivener v. Smith*, 2 DeG., M. & G. 399.

⁵⁰ *Parke, B.*, in *Doe d. v. Roberts*, 7 M. & W. 382.

⁵¹ *Evans v. Crosbie*, 15 Sim. 600; *Wildes v. Davies*, 1 Sm. & Gif. 475; *Alleyne v. Alleyne*, 2 Jo. & La T. 544. But see also *Kellett v. Kellett*, 3 Dow. 248.

⁵² *Doe d. v. White*, 1 East, 33; *Titchfield v. Horncastle*, 2 Jur. 610; *Milsome v. Long*, 3 Jur. N. s. 1073; *Phillips v. Beal*, 25 Beav. 25.

⁵³ *Wright v. Shelton*, 18 Jur. 445.

testator's intention.⁵⁴ But where, in a preceding portion of the will, the testator used the expression "house, land, goods, and chattels," and in a later portion of the instrument directed that his aforesaid "house, goods, and chattels," omitting the word "lands," should go in a particular direction, it was very properly held, that the omission of so important a word could not have been accidental, and that the lands did not pass.⁵⁵ In the case of *Doe d. v.*

* 317 * *Earles*,⁵⁶ the court were divided upon the question whether the words, "all my effects," could pass a remainder in fee: the majority of the court, *Pollock*, Ch. B., and *Parke*, B. (*Platt*, B., dissenting), held that they did not.

23. It may be proper here briefly to allude to some few of the American cases upon this general question. They have, in the main, followed, or professed to follow, the English cases, but with an increasing tendency to extend the force and operation of general terms. In New York the expression, "my property, after my debts are paid, I leave and bequeath to my beloved wife, and wish her to educate my daughters," with nothing in the will to import

⁵⁴ *Doe d. v. Tofield*, 11 East, 246.

⁵⁵ *Roe d. v. Walker*, 3 B. & P. 375; *Lethbridge v. Kirkman*, 2 Jur. N. S. 372; s. c. 25 Law J. Q. B. 89.

⁵⁶ 15 M. & W. 450. Some of the early cases seem to incline to hold that the word "effects" may be held to embrace all a man's property, as much as the word "property" or "estate." Lord *Langdale*, in *Titchfield v. Horncastle*, 2 Jur. 610. And we do not comprehend why "all my worldly effects" is not a phrase of as wide extension, in regard to property, as any other. And it seems obvious, that in the great majority of cases, where the term "effects" is used in a general sense, it is intended to embrace all one's property. Even the phrase "all my worldly goods," in the marriage service of the English Church, is specially used with reference to estates of freehold in land, since the wife is not strictly dowable of any lesser estate. It has always seemed to us that the refinements of the later cases, in attempting to cut down the import of the word "effects" to that of personalty merely, have not had much firm ground to stand upon, especially when that word is used in a general and unlimited sense, as "all my effects" or "worldly effects." It is thus made as nearly synonymous with "estate" or "substance" as can well be conceived. But the later English cases, as before stated, seem to regard the word as having no natural application to any other than personal property. *Parke*, B., in *Doe d. v. Earles*, 15 M. & W. 456. A devise of all the testator's lands will not, strictly speaking, carry leaseholds; but it is so common for unprofessional persons to embrace leaseholds under the term "lands," that in England a statute has been enacted to that effect in the construction of wills, — § 26 Wills Act, 1 Vict., — unless where the terms of the devise indicate a contrary intent.

a different intent, was held to express an intention to pass the whole property of the testator, and give the fee.⁵⁷ The word "property" will, in general, carry a fee.⁵⁸

24. In Massachusetts it seems to be well settled that the general words "estate," "property," in a will, carry real estate, and that they are not to be limited to personalty, unless "there are * qualifying words, or these terms are so connected and * 318 mixed with words expressing only things personal as to limit their meaning."⁵⁹ In *Bullard v. Goffe*,⁵⁹ the will contained these words, "I do hereby give and bequeath to B. all the residue of my furniture and estate, whatever or wherever it may be;" and it was held not to pass the real estate, the will being wholly upon the subject of personalty, and there being no general declaration of intention to dispose of all the property of the testator, and there remaining articles of furniture and personal property not specifically disposed of in the will. But a devise of all one's estate after payment of debts and legacies, passes a fee in lands, although the devisee is appointed executor, and the debts and legacies are not charged on him personally.⁶⁰

25. And the same rule prevails in Connecticut,⁶¹ and, it is believed, in most of the American states. In the last case cited the testator devised real estate to A., in trust for B. and her heirs, and it was held that B. took an equitable fee which she might dispose of by will.

26. A devise of all my goods and effects, real and personal, will carry a fee-simple in real estate.⁶² And in the State of Maine, where it is apparent a fee was intended to pass, words of inherit-

⁵⁷ *Jackson v. Housel*, 17 Johns. 281. See *Wheaton v. Andress*, 23 Wend. 452. See also *Ferguson v. Zepp*, 4 Wash. C. C. 645; *Dowdel v. Hamm*, 2 Watts, 61; *Harper v. Blean*, 3 Watts, 471.

⁵⁸ *Fogg v. Clark*, 1 N. H. 163; *Morrison v. Semple*, 6 Binn. 94. But the import of the term may be restricted to personalty by its manner of use, or by circumstances. *Brown v. Dysinger*, 1 Rawle, 408. A term is a chattel, and passes as personalty. *Brewster v. Hill*, 1 N. H. 350. A devise of all the testator's "rights," in the woods of another, conveys a fee, if the deviser had one. *Newkerk v. Newkerk*, 2 Caines, 345.

⁵⁹ *Shaw*, Ch. J., in *Hunt v. Hunt*, 4 Gray, 190, 193, citing *Bullard v. Goffe*, 20 Pick. 252.

⁶⁰ *Kellogg v. Blair*, 6 Met. 322; *Godfrey v. Humphrey*, 18 Pick. 537; *Tracy v. Kilborn*, 3 Cush. 557.

⁶¹ *Korn v. Cutler*, 26 Conn. 4, where the devise was "of all my estate."

⁶² *Ferguson v. Zepp*, 4 Wash. C. C. 645.

ance will be supplied.⁶³ And a bequest of "the lands of which I am the possessor in England and Scotland, to be divided among the testator's heirs there according to the English law," was held to carry a mortgage in fee.⁶⁴

27. A devise of all the testator's real and personal estate was held not to embrace his interest as mortgagee in an estate, of which he held a partial interest in the equity of redemption.⁶⁵ This decision goes upon the ground that where the testator is evidently dealing with his own property, as where he is creating a fund for the payment of debts and legacies, such general terms will not be held to include estates which the testator holds in trust, either as mortgagee or otherwise, unless there is something in the will or in the extraneous facts admissible in aid of the construction to show that such was the intention of the testator. But the learned judge here admits that his decision goes mainly upon the rule established by the decided cases. But it would seem that such general terms ought to be held sufficient to pass whatever interest the testator had in the mortgage security, unless, as said by Lord *Eldon*, Chancellor, in *Lord Braybrooke v. Inskip*,⁶⁶ there is something in the will or the surrounding facts to rebut such a presumption. It seems to us the presumption in such cases should be, that the mortgage estate is intended to be included, rather than excluded.

⁶³ *Butler v. Little*, 3 Greenl. 239; *s. p.* *Cook v. Holmes*, 11 Mass. 528. Where the words were added to a general devise of real estate to the testator's widow, "to be at her disposal," it was held to carry a fee. *Jackson v. Babcock*, 12 Johns. 389, 393. And any words conveying such intent will be sufficient. *Lillard v. Robinson*, 3 Litt. 415.

⁶⁴ *Re Caldeleugh's Trusts*, 19 L. T. N. S. 377.

⁶⁵ *In re Packman*, Law Rep. 1 Ch. Div. 214.

⁶⁶ 8 Ves. 417, 435.

* SECTION V.

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WHAT WORDS IN A WILL ARE SUFFICIENT TO CREATE A FEE. RULE
IN SHELLEY'S CASE.

1. A general devise of real estate will only convey an estate for life.
2. Such a rule of construction defeats the intent of the testator. English and some American statutes restore it.
3. The rule in Shelley's case, as applied to devises, has led one side of the truth generally.
4. Any charge upon the devisee will convert the estate into a fee.
5. But if the charge be upon the land merely, it will not have that effect.
6. Life-estates and annuities considered in this connection.
7. A devise over will often enlarge the general devise.
8. But the devise over being general will carry a life-estate, thus defeating the general estate *pro tanto*.
9. And where a codicil revokes a devise in fee, and devises same estate generally, it creates only a life-estate.
10. In trust-estates, a fee given either to trustee, or cestui que trust, will make the other a fee.
11. Any form of expression showing such intention will pass a fee.
12. The courts seize any plausible excuse to rescue particular cases from the general rule.
13. The word "estate," whether connected with locality or not, will pass a fee.
14. The distinction between the word "estate," as descriptive of the corpus and of the title, not regarded.
15. The court incline to refer the word "estate" to the title.
16. The fact that the word is associated with locality, and used with express limitation in other places, will not vary effect.
17. The devise of the rents of an estate will pass the fee.
18. But these general words, "estate," "property," &c., must form the pivot of the devise.
19. It is said the word "estate," in the introductory clause of the will, has no effect.
20. The word "estate" allowed to pass a fee whenever it can fairly receive that construction.
21. But, if it occur in the description of the life-estate only, will not have that effect.
22. The force of the word "estate" may be qualified in other portions of the will.
23. The word "estate" will be restricted to a life-estate, where it would otherwise cut off other estates.
24. The terms "property" and "real effects" construed the same as "estate."
25. Enumeration of many words which will, and some which will not, pass a fee.
26. The word "reversion" will pass a fee, but not the words "residue and remainder," in a residuary devise.

27. Devise of all "right," "title," or "interest," or of the testator's "moiety," or "part," or "share," will pass a fee.

* 320 * 28. An exception, condition, or qualification of the devise may show that a fee was meant.

29. Devise of "advowson," "manor," and "share," will pass a fee.

30. Devise of property in tail, not liable to such devise, passes a conditional fee.

31. The present English statute presumes a fee intended, unless the contrary appear. Commentary.

32. The American cases upon this and the last section presented together.

33. To convert a general devise into a fee, there must be a charge upon the devisee or something else.

34. Devise to executors to sell and pay the avails to devisee creates fee in them.

35. Devise over, without words of inheritance, carries only life-estate.

36. What kind of charge upon the devisee will give a fee by implication.

37. The Revised Statutes of New York convert a general devise into a fee.

38. The general rules of the common law upon this subject prevail in Massachusetts.

39. In North Carolina, the operation of general words in a devise is greatly restricted.

40. A devise will be construed to carry such an estate as is requisite for the object.

41. The effect of using words of entailment, in regard to personalty, to create an absolute title.

42. Illustration of the rule by the cases in Pennsylvania.

43. Discussion of the rule in Shelley's case, as applied in America.

n. 120. Discussion of the question in two cases in Vermont.

44. Statement of the decisions in Connecticut upon this point.

45. The rule qualified in Pennsylvania by the courts, and in New York by statute.

46. The Connecticut courts favor the construction of general devises giving a fee.

47. General devise of uncultivated lands will carry fee. Effect of devise to the heir.

48. The word "estate," in America, held a word of the greatest extension.

49. Statement of other cases confirming the general rules before stated.

50. The word "appurtenances," or a condition, may carry a fee.

51. A bequest of personalty absolutely to one, and then in remainder to another, gives only a life-interest to the first.

52. Other cases illustrating the same question.

53. Prefatory words in a will may aid the construction of other words, but are inoperative in themselves.

54. Clear life-estate in personalty enlarged by absolute power of disposition.

55. Estate may be given in trust to an insolvent son, for the benefit of his children at his death.

56. General intent may create an estate in fee, without words of limitation.

57. Where the income of the residue is directed to be paid testator's children, and the corpus divided among grandchildren, if any, it creates a fee-simple in the children.

58. But where an aliquot portion of the whole estate is so devised, the first devisee takes only a life-estate.

59. Where the word "heirs" is used with reference to the devisee, a fee passes, unless clearly controlled.

60. But where the devise gives a power of sale, if devised without consideration, it will defeat the estate over.
61. In Ohio, the devise of "the plantation on which I now live" will carry a fee.
- * 62. In Massachusetts, the word "estate" will carry a fee. * 321
63. Devise of farm, or the proceeds of its sale, creates a legacy to the amount for which the testator sold the farm.
64. Rule in Shelley's case often applied in one case and rejected in another almost identical.
65. Recent case where that rule is applied to real estate, and not to personalty, blended in the same bequest.
66. Case from Rhode Island.
67. Effect of different forms of devise upon the estate.

§ 20. 1. It seems to be entirely well settled in the English courts, as a general rule, that the devise of real estate, merely describing the property, without defining the interest which the devisee shall take, will only give an estate for life.¹ And it will make no difference that the will contains an express declaration of disposing of all the testator's property,² or that a small bequest is made to the heir with a view to cut him off.³ And it will make no difference that the will contains an antecedent devise for life to the heir,⁴ or that the devise is to a class, embracing the heir, as the testator's children,⁵ or that the same property is devised to the same person in fee, in another event.⁶ And the fact that in other portions of the will, or in the immediate context, there may be devises for life, thus showing that testator meant something different by such general devise, will make no difference in the construc-

¹ *Taylor v. Hodges*, cit. in 3 Ch. Rep. 87; *Canning v. Canning*, Mosely, 242; *Deacon v. Marsh*, Moore, 594; *Bullock v. Bullock*, 8 Vin. Ab. 238, pl. 10; *Roe d. v. Holmes*, 2 Wils. 80; *Doe d. v. Blackett*, Cowp. 235; *Doe d. v. White*, 1 Exch. 526; *Wright v. Denn*, 10 Wheat. 204. But see *Wait v. Belding*, 24 Pick. 129.

² *Denn v. Gaskin*, 2 Cowp. 657; *Right v. Sidebotham*, 2 Doug. 759; *Frogmorton v. Wright*, 3 Wils. 414; s. c. 2 W. Bl. 889; *Doe d. v. Wright*, 8 T. R. 64; *Doe v. Child*, 4 B. & P. 385; *Doe d. v. Allen*, 8 T. R. 497; *Doe d. v. Ravell*, 2 Cr. & J. 617.

³ *Denn v. Gaskin*, 2 Cowp. 657; *Roe d. v. Bolton*, 2 W. Bl. 1045; *Right v. Sidebotham*, 2 Doug. 759; *Roe d. v. Daw*, 3 M. & Sel. 518.

⁴ *Awse v. Melhuish*, 1 Br. C. C. 519; *Right v. Compton*, 9 East, 267.

⁵ *Dickins v. Marshal*, Cro. Eliz. 330; *Bowen v. Scowcroft*, 2 Y. & C. 640; *Harding v. Roberts*, 10 Exch. 819.

⁶ *Sturgis v. Dunn*, 19 Beav. 135.

tion.⁷ And the same rule holds as to an estate held *pur autre vie*, where the heir would have been special occupant.⁸

* 322 * 2. It is obvious that in the great majority of the foregoing cases, and in all cases falling within the principles before stated, it must of necessity occur, that they will ordinarily fail of reaching the result intended by the testator; since there can be no rule of construction of more universal acceptance, with the common or unprofessional mind, than that where the devise is without limitation, it will carry the whole estate of the devisor. The English statute, therefore, and some of the American statutes, in bringing the rule of presumption to that point, and making all general devises pass the entire estate of the devisor, unless there is something in the case to show a contrary intent, have only counter-
vailed the wrong interpretation of the courts.⁹

3. And the rule in *Shelley's case*,¹⁰ whereby the word "heirs"

⁷ *Goodtitle v. Edmonds*, 7 T. R. 635; *Doe d. v. Clarke*, 5 B. & P. 343; *Doe d. v. Eve*, 5 Ad. & Ell. 317; *Silvey v. Howard*, 6 Ad. & Ell. 253; *Matthews v. Windross*, 2 Kay & J. 406.

⁸ *Doe d. v. Robinson*, 8 B. & Cr. 296. Sir *E. Sugden*, in *Allen v. Allen*, 2 Dr. & War. 307, 327; 2 *Jarman*, 248.

⁹ 2 *Jarman*, 248.

¹⁰ 1 Co. Rep. 88 b, 101. This rule has been applied in some cases where it was very certain to defeat the intent of the testator; as where a devise is made to a woman, during widowhood, with a subsequent limitation to her heirs. *Curtis v. Price*, 12 Vesey, 89. To make a general devise without words of limitation operate to convey a fee, the intent must be so clear as to satisfy the conscience of the court in declaring it such. If it be merely conjectural what was the intent, the general rule of law will prevail. *Roe v. Blackett*, Cowp. 235. See also *Roberts v. Ogbourne*, 37 Ala. 174; *Parish v. Parish*, id. 591; *Cleveland v. Spilman*, 25 Ind. 95; *Sims v. Smith*, 6 Jones, Eq. 347; *Burke v. Chamberlain*, 22 Md. 308; *Doe v. Dill*, 1 Houston, 398, where the general subject is largely discussed. See also *Physick's Appeal*, 50 Penn. St. 128, where the rule in *Shelley's case* is applied; s. p. *Nice's Appeal*, id. 143. In New Hampshire, the rule in *Shelley's case* was adopted as part of the common law, and continued in force until abolished by statute in 1843. The rule was applied in *Crockett v. Robinson*, 46 N. H. 454. A general devise without words of limitation held to carry a fee in *Manning v. Taylor*, Law Rep. 1 Exch. 235. The rule in *Shelley's case* is applied in *Fuller v. Chamier*, Law Rep. 2 Eq. 682, where a devise to the lawful heir of A. was held to create a fee in A. So also in *McKenzie v. Jones*, 39 Miss. 230. But in *Eastwood v. Avison*, Law Rep. 4 Exch. 141, by a will, made before the Wills Act came in force, the testator devised certain lands to his grandson, and, if he should die without leaving issue, directed that the property should return to the E.

* is always to be received as a word of limitation, and * 323 not of purchase, unless the clearest intention to the contrary is declared by the words of the instrument, is one having no just application to devises, and which has more commonly led one side of the real intention of the devisor than almost any other. It will be found, in our review of the American cases upon both the foregoing points, that the American courts have not adhered with any thing like the same degree of pertinacity to either of these rules as that which characterizes the English decisions.

4. There are, however, many exceptions to the rule, that a general devise will pass only a life-estate. Thus if the devisee is charged with the payment of the testator's debts and legacies, or with a gross sum, in short, if he is charged with any sum, he will take a fee, upon the ground that otherwise he might incur loss, by having to pay more than he would receive; and it will make no difference that the disparity between the charge and the value of the estate devised is so great that there is but the remotest possibility that any loss would fall upon the devisee, even if he took only a life-estate. Still possibility of loss is sufficient to convert his estate into a fee.¹¹

family, but, if he shall have any children, he shall have power to give it to such children by will, was held not to create an estate in tail by implication, but only a life-estate. But a devise to E. for lifetime, and immediately after her decease to her legal heirs, was held to create a fee. *Steiner v. Kolb*, 57 Penn. St. 123. See also *Quillman v. Custer*, id. 125; *Shutt v. Rambo*, id. 149; *Bacon's Appeal*, 57 Penn. St. 504. Where, by the general provisions of the will, it is apparent the testator intended his widow to have such an estate in lands devised as to carry out the purposes of the instrument, and that must be an estate in fee, it will be so construed, if consistent with the words. *Lloyd v. Jackson*, Law Rep. 2 Q. B. 269; *Hance v. West*, 3 Vroom, 233; *Cowles v. Cowles*, 53 Penn. St. 175; *Turner v. Kittrell*, 1 Winst. Eq. 39; *Pugh v. Drew*, 17 W. R. 988, V. C. J. Where an estate is given to A. for life, and a remainder to the issue is accompanied by words of distribution and by words which would give a fee or an estate tail to the issue, A. has only a life-estate in either case. *Bradley v. Cartwright*, Law Rep. 2 C. P. 511. See also *Grieve v. Grieve*, Law Rep. 4 Eq. 180.

¹¹ 2 Jarman, 248; Co. Litt. 9 b; *Collier's Case*, 6 Co. R. 16 a; *Walker v. Collier*, Cro. Eliz. 379; *Salmon v. Denham*, Com. Rep. 323; *Moone v. Heaseman*, Willes, 138; *Doe v. Holmes*, 8 T. R. 1; *Goodtitle v. Maddern*, 4 East, 496; *Blinston v. Warburton*, 2 Kay & J. 400. And it makes no difference that the charge is contingent: that will not prevent the estate becoming a fee. *Abrams v. Winshup*, 3 Russ. 350; *Doe v. Phillips*, 3 B. & Ad. 753. But see *Varney v. Stevens*, 9 Shep. 331. See also *McLellan v. Turner*, 3 id. 436. But

* 324 * 5. And it will make no difference whether the devisee is directed to pay or to pay out of the land,¹² or out of the land and other things bequeathed at the same time.¹² But where the sum is merely made a charge upon the land, it will have no effect in extending the devise.¹³ And the rule as to annuities charged on the land is the same.¹⁴

6. And it will not prevent the enlargement of the estate of the devisee by being subjected to a charge, that he is also made executor.¹⁵ But this rule does not apply to a specific devise for life, which will not be enlarged by any charge imposed upon the devisee,¹⁶ or where the estate is a life-estate only, by clear implication.¹⁷ And the rule of enlargement will apply to an annual charge, directed to be paid by the devisee, whether in general terms, or out of the land.¹⁸ And it will make no difference that the current income exceeds the annual charge: the estate of the

it is said the presumption of intent to give a fee, from imposing a charge in gross upon the devisee, is not conclusive. *Lithgow v. Kavenagh*, 9 Mass. 165. A devise on condition that the devisee shall convey other lands in which he has an interest to third persons will carry a fee. *Gibson v. Horton*, 5 Har. & J. 177. A devise with power to convey in fee carries the fee, but with a power to devise in fee carries only a life-estate, it is said, in *Doe v. Howland*, 8 Cow. 277, per *Savage*, Ch. J. But this is doubted by the reporter, who was the better lawyer, and was unquestionably right in denying the rule as laid down. A devise for life, with the power to convey or to devise in fee, is but a power of appointment, superadded to the life-estate, and, if not exercised, the remainder is undisposed of.

¹² *Doe d. v. Snelling*, 5 East, 87; *Matthews v. Windross*, 2 Kay & J. 406. See the late case of *Pickwell v. Spencer*, L. R. 7 Ex. 105, s. c. 6 id. 190. The opinion of Lord Ch. J. *Cockburn* here shows that such cases, even in England, are now decided upon the apparent intent of the testator.

¹³ *Denn v. Mellor*, 5 T. R. 558; *Fairfax v. Heron*, Prec. in Ch. 67; *Doe d. v. Garlick*, 14 M. & W. 698; *Vick v. Sueter*, 3 Ell. & Bl. 219; *Burton v. Powers*, 3 Kay & J. 170. The cases of *Doe v. Richards*, 3 T. R. 356, *Gully v. Bishop of Exeter*, 12 J. B. Moo. 591, s. c. 4 Bing. 290, which have been claimed as holding the opposite, do not profess to do so; or, if so, have not been followed. *Doe d. v. Clarke*, 1 Cr. & Mees. 39.

¹⁴ 2 Jarman, 251; *Andrew v. Southouse*, 5 T. R. 292.

¹⁵ *Dolton v. Hewen*, Madd. & Geld. 9; 2 Jarman, 249.

¹⁶ *Willis v. Lucas*, 1 P. Wms. 472; *Doe d. v. Wrighte*, 2 B. & Ald. 710.

¹⁷ *Legatt v. Sewell*, 2 Vern. 551; *Denn v. Slater*, 5 T. R. 335; *Doe d. v. Owens*, 1 B. & Ad. 318.

¹⁸ *Spicer v. Spicer*, Cro. Jac. 527; *Shailard v. Baker*, Cro. Eliz. 744; *Baddeley v. Leppingwell*, 3 Bur. 1533; *Goodright v. Allin*, 2 Wm. Bl. 1041; *Same v. Stocker*, 5 T. R. 13; 2 Jarman, 250, and many other cases cited by him.

devisee will still be enlarged to a fee, unless the charge is directed to cease with the estate of the devisee.¹⁹

7. And where there is a devise of an estate over, in a particular event, as where the devisee shall die under age, it is regarded as enlarging a general devise so as to carry a fee,²⁰ upon the ground that the provision for passing the estate over, in a particular event, raises an implication that it shall abide with the devisee in all other contingencies. And the rule applies even where the * devise over is only of a life-estate.²¹ And it makes no * 325 difference that the devise over is upon the event of the devisee reaching any other age than majority;²² or if the dying under age is associated with any other contingency, as dying without issue,²³ it would not seem essential to the enlargement of the devise that the devise over should depend upon the decease of the devisee at any particular age, or if it depend upon his decease without issue.²⁴ But if it is made to depend upon a collateral event not connected with the death of the devisee, as upon the devisee or some other person doing any particular act, as disturbing the testator's widow in the enjoyment of premises devised to her, it could have no effect in enlarging the estate of the devisee.²⁵

8. And where the first devise is in terms in fee, and the devise over is general, the devisee in remainder will only take a life-estate.²⁶ In such cases, the testator is supposed to have used the different forms of expression, because he did not intend to give the same over which he gave conditionally to the first donee; but the intention is commonly otherwise,²⁷ — that the estate over was intended to carry all that had been before given.

9. And the same rule of construction applies, where the testator by a codicil revokes a devise in fee, and devises the same estate to another indefinitely: only a life-estate is held to pass, notwithstanding

¹⁹ 2 Jarman, 250.

²⁰ Doe d. v. Cundall, 9 East, 400; Marshall v. Hill, 2 M. & S. 608; Burke v. Annis, 11 Hare, 232.

²¹ 2 Jarman, 251; Frogmorton v. Holyday, 3 Bur. 1618.

²² Doe v. Coleman, 6 Price, 179.

²³ Toovey v. Bassett, 10 East, 460.

²⁴ 2 Jarman, 252.

²⁵ Roe v. Blackett, 1 Cowp. 235.

²⁶ Middleton v. Swain, Skinn. 339; Beveston v. Hussey, id. 385, 562; Fairfax v. Heron, Prec. in Ch. 67; Roe v. Holmes, 2 Wils. 80.

²⁷ 2 Jarman, 252.

ing the obvious purpose to give all that was before devised, there being no words sufficient to effectuate the testator's purpose.²⁸

10. But a devise in fee, in trust for another, without any words of limitation, will make the equitable estate of the cestui que trust coextensive with that of the trustee.²⁹ And it is also holden, that where the devise to the trustee is without limitation, but creating a trust for one in fee, the trustee shall also take a fee.³⁰ * And it has been held, that, in a devise to trustees in fee for the support of children during minority, the cestuis que trust take an estate in fee.³¹ But the case was questioned by Lord *Hardwicke*.³²

11. The usual form of creating an estate in fee-simple is by giving the property to the devisee, his heirs and assigns for ever; but to him and his heirs is all that is technically requisite.³³ But any form of expression in a devise which shows an intention to give the whole title will be held sufficient for that purpose; as a devise in fee-simple; ³⁴ or to one for ever; ³⁵ or to one and his successors; or to one and his blood, or his house, or his family; or to one or his heirs; or to one and his executors; or to two and heirs, omitting "heir;" or to a man and his, and to do what he will with it; or to him and his, simply; to one, to give and sell, or to give and sell and do therewith at his will and pleasure; or to a person to her own use, to give away at her death to whom she pleases; or to be at the discretion of a person, — and all similar expressions, showing an intention to have the devisee enjoy the fee-simple, — will have the effect to convey it.³⁶ But some of the

²⁸ *Doe d. v. Thomson*, 12 Moo. P. C. C. 116.

²⁹ *Challenger v. Sheppard*, 8 T. R. 597; *Knight v. Selby*, 3 M. & Gr. 92; *Moore v. Cleghorn*, 10 Beav. 423; *Hodson v. Ball*, 14 Sim. 558; *Hutchinson v. Stephens*, 1 Keen, 240.

³⁰ *Shaw v. Weigh*, 2 Str. 798.

³¹ *Newland v. Shephard*, 2 P. Wms. 194; s. c. 2 Eq. Cas. Ab. 329, pl. 4.

³² *Fonnereau v. Fonnereau*, 3 Atk. 315. But see *Peat v. Powell*, Amb. 387; s. c. 1 Eden. 479.

³³ *Shelley's Case*, 1 Co. 88 b, 101.

³⁴ *Baker v. Raimond*, And. 51; 8 Vin. Ab. 206, pl. 8; 2 Jarman, 253.

³⁵ *Idle v. Cooke*, 2 Ld. Ray. 1144, 1152; *Whiting v. Welkings*, 8 Vin. Ab. 206, pl. 6; *Chamberlaine v. Turner*, Cro. Car. 129; *Heath v. Heath*, 1 Br. C. C. 147. But see *Fisher v. Wigg*, 1 P. Wms. 14, *Morgan v. Morgan*, L. R. 10 Eq. 99, where similar terms were differently construed.

³⁶ 2 Jarman, 253, 254. See also 8 Vin. Ab. 209, pl. 1; Co. Litt. 9 b; 8 Vin.

foregoing forms of expression have been held to carry only a life-estate³⁷ by the force of other words.

12. The appointment of one to be the testator's heir, or "universal heir," will be sufficient to indicate an intention to create a fee-simple in all lands devised to such person.³⁸ But it would not be useful to pursue these refinements. The only principle involved is, that where the will contains any expression in addition to the * mere general devise, indicating that an estate in * 327 fee-simple was intended to be given, the court will lay hold of such expression, in order to give what the testator intended to give by the general devise. In other words, the courts, having adopted a false construction of the effect of a general devise of real estate, are always ready to adopt any plausible excuse for rescuing particular cases from the wrong direction which such general rule would give them. It would be but a natural reflection to suggest the surer remedy in such cases, by abrogating the rule itself.³⁹

13. We have already stated that the word "estate" is generally held sufficient to pass real estate, especially in a residuum.⁴⁰ And we have incidentally stated that this word, without restriction, will carry all the title which the deviser had at the time his will comes into operation. And the cases are too numerous to be here

Ab. 206, pl. 10; *Counden v. Clerke*, Hob. 29, 33; *Chapman v. Dalton*, Plowd. 284; 8 Vin. Ab. 233, pl. 12; *Goodtitle v. Otway*, 2 Wils. 6; *Wright v. Atkyns*, 17 Ves. 255; *Read v. Snell*, 2 Atk. 642; *Rose d. v. Hill*, 3 Bur. 1881; *Timewell v. Perkins*, 2 Atk. 102; *Attorney-General v. Gilbert*, 10 Beav. 517; *Hickman v. Haslewood*, 6 Ad. & El. 167; *Pratt v. Pratt*, id. 180; *Ashby v. Baines*, 2 C. M. & R. 23; *Mudge v. Blight*, 1 Cowp. 352.

³⁷ *Goodright v. Barron*, 11 East, 220; *Bromitt v. Moor*, 9 Hare, 374. The same rule of construction as to allowing general words to carry a fee, where such appears to be the intention, applies to contingent as to vested estates. *Harrison's Estate*, in re, L. R. 5 Ch. App. 408.

³⁸ *Jenkins v. Lord Clinton*, 26 Beav. 108, 121.

³⁹ We do not allow ourselves to speak thus of any established rule of construction which is regarded even as doubtful, which this has not been for many years. We think, therefore, that the courts need not have waited for the interference of the legislature, which they evidently should do in all doubtful cases. See *Shaw v. Hoard*, 18 Ohio, n. s. 227; *Karker's Appeal*, 60 Penn. St. 141; *King v. Ackerman*, 2 Black. 408; opinion of *Grier, J.*, *Ex'rs of Condict v. King*, 2 Beasley, 375; *Holliday v. Dixon*, 27 Ill. 33. In this latter case the word "never" was rejected to reach the true intent.

⁴⁰ Ante, § 19, pl. 1.

repeated, that the word "estate" will be sufficient to create a fee-simple.⁴¹ And the word "estates" in the plural number has been held to have the same effect.⁴² And it will make no difference that the word "estate" is connected with words of locality, as "my estate," or "my estates," at or in a certain place;⁴³ * 328 or "my estate of Ashton;"⁴⁴ * or called by any other name;⁴⁵ or all that estate I bought of A;⁴⁶ or my landed estates in W., &c.⁴⁷

14. There is a distinction attempted in some of the cases between a devise of "all my estate," and the devise of "an estate," at a particular place, the former referring to the testator's title, and the latter only to the corpus of the property, and being merely synonymous with saying "my farm at A."⁴⁷ And there seems to us good foundation for the distinction. But Mr. Jarman regards it as overruled by the later cases, as it seems to be, and, if so, may be regarded as another illustration of adopting a second false construction, in order to escape from a former one.⁴⁸ But Mr. Jarman argues with great apparent confidence against the sound-

⁴¹ *Reeves v. Winnington*, 3 Mod. 45; *Hyley v. Hyley*, id. 228; *Carter v. Horner*, 4 Mod. 89; *Countess of Bridgewater v. Duke of Bolton*, 1 Salk. 236; *Scott v. Alberry*, 1 Com. 337; *Beachcroft v. Beachcroft*, 2 Vern. 690; *Murray v. Wise*, Prec. in Ch. 264; s. c. 2 Vern. 564; *Shaw v. Bull*, 12 Mod. 593; *Cliffe v. Gibbons*, 2 Ld. Ray. 1324; *Barry v. Edgeworth*, 2 P. Wms. 523; *Tuffnell v. Page*, 2 Atk. 37; *Timewell v. Perkins*, id. 102; *Ridout v. Pain*, 3 Atk. 486; *Doe v. Chapman*, 1 H. Bl. 223; *Doe v. Underdown*, Willes, 296; *Doe v. Woodhouse*, 4 T. R. 89; *Doe v. Roper*, 11 East, 518; *Doe v. Gilbert*, 3 B. & B. 85; *Doe v. Walker*, 15 Q. B. 28; *Frogmorton v. Wright*, 3 Wils. 414.

⁴² *Macaree v. Tall*, Amb. 181; *Fletcher v. Smiton*, 2 T. R. 656; *Roe d. v. Bacon*, 4 M. & Sel. 366; *White v. Coram*, 3 K. & J. 652; *Jongsma v. Jongsma*, 1 Cox, 362. This point is doubted in *Goodwyn v. Goodwyn*, 1 Ves. Sen. 226, 229; but that mere query of Lord *Hardwicke* has not been followed.

⁴³ *Ibbetson v. Beckwith*, Cas. temp. Talbot, 157; *Barry v. Edgeworth*, 2 P. Wms. 523; *Tuffnell v. Page*, 2 Atk. 37; s. c. 3 Barn. 9; *Holdfast d. v. Marten*, 1 T. R. 411; *Uthwatt v. Bryant*, 6 Taunt. 317.

⁴⁴ *Chichester v. Oxendon*, 4 Taunt. 176; s. c. 4 Dow, 65, 92. It is here said the words used are equivalent to "my Ashton estate."

⁴⁵ *Roe d. v. Wright*, 7 East, 259.

⁴⁶ *Bailis v. Gale*, 2 Ves. Sen. 48; *Cookson v. Bingham*, 3 DeG., M. & G. 668, overruling the doubt expressed in *Pierson v. Vickers*, 5 East, 548, 554; *Gardner v. Harding*, 3 J. B. Moo. 565; *Paris v. Miller*, 5 M. & Sel. 408; *Denn d. v. Hood*, 7 Taunt. 35; *Doe d. v. Fricker*, 6 Exch. 510.

⁴⁷ *Petteward v. Prescott*, 7 Ves. 541, 546.

⁴⁸ 2 Jarman, 256.

ness of the distinction, and in favor of the later cases having disregarded it. We agree that there is nothing in the rule; but we cannot so readily comprehend that there is any difference between a devise of "my estate" at A. and "my house" or "my farm" at A. We are glad if Mr. Jarman can see the difference.

15. The case of *Randall v. Tuchin*⁴⁹ is another instance of nice refinement upon this question. The testator devised fourteen dwelling-houses, with their appurtenances, describing them minutely, to his niece J., "*all which* estates I devise," &c., "for life," to J., and after her decease to her son; and it was held to pass the fee to the son, by force of the word "estate," as applied to the before-described dwelling-houses, it being considered that this word referred to the testator's title in the dwelling-houses, as well as to the dwelling-houses themselves.

16. And it will not restrain the operation of the word "estate" in carrying a fee, that it is elsewhere used in the will in connection with an express limitation in fee.⁵⁰ And it will not vary the case that the word "estate" is associated with locality, and used * in conjunction with words of express limitation in fee in the * 329 same will, but it will still be held adequate to pass a fee.⁵¹

17. And the devise of the rents of an estate is held to pass the fee, the same as the devise of the estate itself.⁵² And the same rule obtains where the devise is of the income of an estate. (a)

18. But it is considered important that the words "estate," "property," "inheritance," and other similar terms, which have been held sufficient to indicate an intention to pass the fee, should occur in the very point upon which the gift is made to turn; so that it may fairly be said that the devise is made to operate upon this word "estate," &c., rather than upon any other word, such as "home," "land," &c., which is merely descriptive of the corpus of the property.⁵³ But it seems to be held sufficient for this pur-

⁴⁹ 6 Taunt. 410. This point of the word "estate," referring to the title, is here very ingeniously argued by *Gibbs*, Ch. J. See also *Arminer's Case*, Lofft, 95; *Doe v. Lean*, 1 Q. B. 229.

⁵⁰ *Uthwatt v. Bryant*, 6 Taunt. 317.

⁵¹ *Wilkinson v. Chapman*, 3 Russ. 145.

⁵² *Stewart v. Garnett*, 3 Sim. 398.

(a) *Mannox v. Greener*, L. R. 14 Eq. 456. So the bequest of the produce of a fund, without limit as to time, passes the fund itself. *Gulick's Ex'rs v. Gulick*, 25 N. J. Eq. 324.

⁵³ *Heath, J.*, in *Randall v. Tuchin*, 6 Taunt. 410.

pose that the devise is first to one for life, of the houses, lands, &c., and the remainder of said estates to others;⁵⁴ which presents the distinction as turning upon a very narrow point, narrower, we think, than any modern judge would care to have his judgment rest upon, if the matter were entirely *res integra*.⁵⁴ And we infer from the English cases, that in every instance where the devise is primarily made to operate upon the corpus of the property, described by name or by metes and bounds, or in any other way, and then the words "my aforesaid estate," or "property," or any similar expression, is used as merely synonymous with the description before given, it will have no effect to enlarge the operation of the devise.⁵⁵

19. So also it has been held that the word "estate," occurring merely in the introductory part of the will, in a general declaration of intention to dispose of all the testator's property, will not have the effect to pass a fee by means of an unlimited devise.⁵⁶ But Lord *Hardwicke*, in *Grayson v. Atkinson*,⁵⁷ seems to have relied chiefly upon this general introductory declaration in construing the devise as carrying a fee. And there seems to be quite

* 330 * as good ground for that reliance as for many other reasons whereby the courts have sought to rescue a general devise from that false construction into which a mistaken general rule had thrown it.

20. And it has accordingly been held, that where the testator devised his "worldly estate as follows" (and, after making some particular dispositions, continued), "As to the rest of my estate, the two houses," describing them, "I give to my wife for life, and after her decease to my daughter and two sons," the estate over passed a fee,⁵⁸ although the testator had no real estate but the two houses specifically described. The argument of *Tindal*, Ch. J., is most satisfactory to show that in all cases a general devise is intended by the testator to carry a fee; but it does not make the

⁵⁴ *Roe d. v. Bacon*, 4 M. & Sel. 366; *Uthwatt v. Bryant*, 6 Taunt. 317.

⁵⁵ *Doe d. v. Clayton*, 8 East, 141; *Doe d. v. Clarke*, 1 Cr. & Mees. 39; *Doe d. v. White*, 1 Exch. 526; *Vick v. Sueter*, 3 Ell. & Bl. 219.

⁵⁶ *Ibbetson v. Beckwith*, Cas. t. Talb. 157; *Frogmorton v. Wright*, 2 W. Bl. 889; s. c. 3 Wils. 414; *Loveacres d. v. Blight*, 1 Cowp. 352; *Denn d. v. Gaskin*, 2 id. 657; *Doe d. v. Allen*, 8 T. R. 503.

⁵⁷ 1 Wilson, 333.

⁵⁸ *Gall v. Esdaile*, 8 Bing. 323. But see contra in regard to same will. s. c. 1 R. & My. 540.

distinction between this and the ordinary case so perfectly clear to our mind.

21. And where the word "estate" occurs in that portion of the will creating an express life-estate, but the devise in remainder is described by some less comprehensive term, it will not carry an estate in fee,⁵⁹ it being presumed that the more comprehensive terms in the devise over were purposely omitted. And a similar rule of construction applies where the word "estate" occurs in an express devise for life, and the devise over is of "all the above bequeathed lands;" it will not pass a fee.⁶⁰

22. It is easy to perceive that the general force and operation of the word "estate" will be qualified by other portions of the will, as where the testator declares that he intended the devisees to take a life-estate merely.⁶¹

23. The word "estate" will not be construed to carry a fee, where such construction will have the effect to cut off all the subsequent limitations.⁶² But the fact that a devise to the testator's widow * of all his property, both real and personal, for ever, * 331 is charged with an annuity during the life of the devisee, and with a considerable augmentation of it after her decease, will not justify the conclusion that the devise was intended to carry only a life-estate.⁶³

24. It is settled that the word "property" will have the same effect in passing a fee as the word "estate."⁶⁴ And the same construction has been given to the phrase "real effects."⁶⁵

25. We have already stated many similar forms of expression which have been held to pass a fee, such as "all I am worth," "all

⁵⁹ *Roe d. v. Blackett*, Cowp. 235; *Vick v. Sueter*, 3 Ell. & Bl. 219; *Sturgis v. Dunn*, 19 Beav. 135.

⁶⁰ *Doe d. v. Tucker*, 3 B. & Ad. 473. See also *Doe d. v. Gwillim*, 5 B. & Ad. 122; *Doe d. v. Lean*, 1 Q. B. 229; *Wight v. Leigh*, 15 Vesey, 564; *Challenger v. Sheppard*, 8 T. R. 597.

⁶¹ *Bruce v. Bainbridge*, 5 J. B. Moore, 1; 2 B. & B. 123. See also *Spry v. Bromfield*, 7 M. & W. 545; s. c. 10 Sim. 94.

⁶² *Key v. Key*, 4 DeG., M. & G. 73; *Martin v. M'Causland*, 4 Ir. Law, 340.

⁶³ *Doe v. Roper*, 11 East, 518.

⁶⁴ *Roe v. Pattison*, 16 East, 221; *Nicholls v. Butcher*, 18 Vesey, 193; *Patton v. Randall*, 1 J. & W. 189; *Doe v. Roberts*, 11 Ad. & Ell. 1000; *Footner v. Cooper*, 2 Drew. 7; *Bentley v. Oldfield*, 19 Beav. 225.

⁶⁵ *Hogan v. Jackson*, Cowp. 299; s. c. 3 Br. P. C. Toml. 388; *Macnamara v. Whitworth*, Coop. 241.

the property I may die possessed of," and such like general terms.⁶⁶ It is clear, also, that the word "inheritance" will carry the fee.⁶⁷ But this word may be so used as to indicate that it is designed to qualify the title of the testator, rather than that which he intended to devise, as "my lands of inheritance." The word "hereditaments" was thought by Lord *Holt* to imply a fee;⁶⁸ but it has since been held otherwise.⁶⁹ And a devise of "all my copyhold in A." has received a similar construction.⁷⁰ But an estate in fee will pass by devise of the remainder.⁷¹

26. And it has been held that the devise of a "reversion" will pass an estate in fee,⁷² although this had been questioned in earlier cases.⁷³ But the words "residue," or "remainder," as commonly used in a residuary clause, have been held not to have that effect.⁷⁴ But we apprehend the general rule is that the conveyance of all the residue of one's estate will carry a fee. (a)

27. A devise of lands, with all right and title to the same, or all interest in the same, will pass a fee.⁷⁵ And it seems to be settled that the devise of the testator's "moiety," "part," * 332 "share," * of real estate, will carry a fee, if such was the testator's interest.⁷⁶ But if there is a direction in the will, that in case of the decease of any of the primary devisees, under age or unmarried, the share or part of such devisee shall go over to the survivors, it has been held that only an estate for life will pass.⁷⁷ But we see no sufficient reason for this distinction, and we do not regard it as maintainable upon principle, and it seems to be abandoned in the late case of *Bentley v. Oldfield*.⁷⁸

⁶⁶ Ante, § 19.

⁶⁷ *Widlake v. Harding*, Hob. 2; 2 Jarman, 263.

⁶⁸ *Smith v. Tindal*, 11 Mod. 102; *Lydcott v. Willows*, 3 Mod. 229.

⁶⁹ *Hopewell v. Ackland*, 1 Salk. 239; *Denn v. Mellor*, 5 T. R. 558; s. c. 6 id. 175; s. c. 1 B. & P. 558; *Doe d. v. Allen*, 8 T. R. 497, 503.

⁷⁰ *Doe v. Lawes*, 7 Ad. & Ell. 195.

⁷¹ *Norton v. Ladd*, 1 Lut. 755; *Baker v. Wall*, 1 Ld. Ray. 185.

⁷² *Bailis v. Gale*, 2 Ves. Sen. 48.

⁷³ *Peiton v. Banks*, 1 Vern. 65.

⁷⁴ *Canning v. Canning*, Mosely, 240; *Denn v. Mellor*, 5 T. R. 558.

(a) *Lincoln v. Lincoln*, 107 Mass. 590.

⁷⁵ *Sharp v. Sharp*, 6 Bing. 630; *Andrew v. Southouse*, 5 T. R. 292.

⁷⁶ *Doe d. v. Fawcett*, 3 C. B. 274; *Montgomery v. Montgomery*, 3 Jo. & La T. 47; *Green v. Marsden*, 1 Drew. 646, 653.

⁷⁷ *Woodward v. Glasbrook*, 2 Vern. 388; *Pettywood v. Cook*, Cro. Eliz. 52; *Doe d. v. Frost*, 1 B. & Cr. 638.

⁷⁸ 19 Beav. 225.

28. And where an estate in fee is devised with the exception out of the same of one house or any other portion, by metes and bounds or such specific description as to identify the same, which is given to another, in general terms, it will pass an estate in fee of the excepted portion.⁷⁹ And where lands are devised to one in general terms, and in a certain event to another in fee, and other lands substituted as to the first taker, in which latter an estate in fee is given, it has been held that an estate in fee will pass under the first devise, upon the strong presumption that the same interest was intended to be given in regard to both.⁸⁰ And where the devise is general, but upon condition, that if the devisee or *his heirs* shall aliene, then to become void; an estate in fee will pass by force of the condition, although the condition itself is void as being repugnant to the devise.⁸¹

29. The devise of a "perpetual advowson," or of a "manor," or a share in the New River Company (which is a freehold of inheritance), has been held to pass only a life-estate, as being descriptive of the subject-matter, the same as "lands," and not of the testator's interest.⁸²

30. Upon a devise of lands, in which an estate tail cannot be created, as copyholds of a manor in which there is no custom to entail, in such terms as to have created an estate-tail in lands held in fee-simple, the devisee takes an estate in fee-simple conditional, * which becomes absolute upon the birth of inherita- * 333 ble issue under the entail.⁸³ And the same rule applies to a similar bequest of personal property which is not susceptible of entailment.⁸⁴

31. By the present English statute,⁸⁵ a general devise will pass a fee, "unless a contrary intention shall appear by the will;" thus restoring the legitimate presumption naturally arising from the

⁷⁹ Doe d. *v.* Lawton, 4 Bing. N. C. 455.

⁸⁰ Green *v.* Armsteed, Hob. 65; Doe d. *v.* Plyer, 14 Jur. 326; 14 Q. B. 512.

⁸¹ Shailard *v.* Baker, Cro. Eliz. 744.

⁸² Pocock *v.* Bishop of Lincoln, 3 Br. & B. 27; Webb *v.* Byng, 2 Kay & J. 669; Paice *v.* Archbishop of Canterbury, 14 Vesey, 364; Middleton *v.* Swain, Skinn. 339.

⁸³ Doe d. *v.* Simpson, 4 Bing. N. C. 333; s. c. 5 Scott, 770; Same, 3 Scott, N. R. 774; s. c. 3 M. & Gr. 929; Doe *v.* Clark, 5 B. & Ald. 458.

⁸⁴ Stafford *v.* Buckley, 2 Vesey, Sen. 170; 2 Jarman, 266.

⁸⁵ 1 Vic. c. 26, § 28.

facts.⁸⁶ This presumption will not be defeated by showing that another devise in the will contains formal words of limitation,⁸⁷ or that a special power of appointment is given to the devisee.⁸⁸ Mr. Jarman's comment upon this reversing of the presumption arising from a general devise is truly significant of the general sentiment of the profession there and everywhere. "Upon the whole," says this learned writer, "the enlargement of the operation of an indefinite devise may be regarded as one of the most salutary of the new canons of interpretation which have emanated from the legislature."

32. We shall find it convenient, to ourselves, and conducive to brevity, in presenting a few of the American cases bearing upon the general question discussed in this and the next preceding section, not to discriminate between the two, as we have done in regard to the English cases. The questions, what words will pass real estate, and what will pass a fee, are so intimately associated in principle, that most of the cases bearing upon the former have more or less bearing upon the latter.

33. It has been decided in New York,⁸⁹ that, where the terms of the devise are such as clearly to indicate the purpose of the testator to dispose of his whole interest in the property devised, the devisee will take an estate in fee, although there be no words of limitation; and such is especially the case, where in the
 * 334 * introductory part of the will the testator expresses the intention to dispose of his estate, using the words to denote the quantum of interest or property, and not as a mere description of the land devised. And a fee will pass by a devise without words

⁸⁶ 2 Jarman, 266. A general devise of land with the power to dispose of it will naturally be construed to carry the fee. *Hazel v. Hagan*, 47 Mo. 277; *Same v. Woods*, id. 288; *Cummings v. Shaw*, 108 Mass. 159; *Borden v. Downey*, 35 N. J. L. 74. But it is otherwise where a general power of disposition is annexed to an estate for life. *Ib.* But see contra, *Geyer v. Wentzel*, 68 Penn. St. 84.

⁸⁷ *Wisden v. Wisden*, 2 Sm. & Gif. 396.

⁸⁸ *Brook v. Brook*, 3 Sm. & Gif. 280. See also *Nichols v. Hawkes*, 10 Hare, 342; *Reay v. Rawlinson*, 7 Jur. n. s. 118; 29 Beav. 88; *Mansergh v. Campbell*, 25 Beav. 544; s. c. 3 DeG. & J. 232.

⁸⁹ *Fox v. Phelps*, 17 Wend. 393; s. c. affirmed, 20 Wend. 437; *Earl v. Grim*, 1 Johns. Ch. 494. But in the later cases in this state no stress is placed upon the introductory clause. *Van Derzee v. Van Derzee*, 30 Barb. 331.

of limitation, where a charge is created on the person of the devisee, in respect of the estate devised, unless there be other words in the will which go to limit the quantum of interest. Where the charge is upon the land, or upon the rents and profits, the rule is otherwise.⁹⁰ But a general devise of the land without words of limitation will not pass a fee, unless there is something in the will that shows such was the intent of the testator.⁹¹ A devise of all the residue of my real and personal property will carry a fee.⁹² A devise of the rents and profits is the same as a devise of the estate.⁹³

34. Where there is an explicit devise to one, followed by an * equally explicit devise to executors, expressed to be * 335 notwithstanding the former devise, and directing the execu-

⁹⁰ *Fox v. Phelps*, 17 Wend. 393; *Jackson v. Merrill*, 6 Johns. 185; *Jackson v. Bull*, 10 id. 148; *Jackson v. Martin*, 18 id. 31. To carry a fee by implication it is requisite that the charge should be absolute, and not merely contingent, as where it is charged upon the whole estate, which may rest only upon the personalty, and not upon the lands. *Jackson v. Harris*, 8 Johns. 141; *Jackson v. Babcock*, 12 Johns. 389; *Tanner v. Livingston*, 12 Wend. 83; *Spraker v. Van Alstyne*, 18 Wend. 200, reversing s. c. 13 id. 578; *Heard v. Horton*, 1 Den. 165. Charge equal to one-half the value of the land is sufficient. *Fox v. Phelps*, 20 Wend. 437. So also to support the devisee's mother. *Jackson v. Martin*, supra.

⁹¹ *Ferris v. Smith*, 17 Johns. 221; *Olmstead v. Oldstead*, 4 N. Y. 56. The word "assigns" is not material to conveying a fee, where it is omitted after the word "heirs," *Summers v. Burtis*, 4 Edw. 728; or where it is used without that word, *Chrystie v. Phyfe*, 19 N. Y. 344. To enlarge a devise in general terms to a fee, there must be something more than the general introductory declaration of intention to dispose of all the testator's property; there must be words of disposition as well as the intent. *Harvey v. Olmsted*, 1 N. Y. 483; affirming same, 1 Barb. 102; *Jackson v. Wells*, 9 Johns. 222; *Vanderwerker v. Vanderwerker*, 7 Barb. 221. An explicit devise for life will not be enlarged to a fee by charging the devisee with the payment of debts. *Tanner v. Livingston*, 12 Wend. 83. But a devise of "all the property of which the testator may be possessed," for the term of the natural life of the devisee, with a charge to pay \$2,000 to the testator's nephew, was held in Florida to pass a fee. *Merritt v. Brantly*, 8 Fla. 226. But this case turned upon its particular circumstances, and did not follow the general rule. Expressions, qualifying a general devise, often have the effect to enlarge its operation. *Henry v. Gonterman*, 1 Met. (Ky.) 465.

⁹² *Rathbone v. Dyckman*, 3 Paige, 9.

⁹³ *Paterson v. Ellis*, 11 Wend. 259, 298; *Smith v. Post*, 2 Edw. 523; *Craig v. Craig*, 3 Barb. Ch. 76.

tors to sell the estate and pay the avails to the first devisee, it was held to vest a fee in the executors.⁹⁴

35. But where the testator devised land to his wife during widowhood, and on her death to be "equally divided" between his two sons, and there were no words of inheritance in the will, held that the sons took a life-estate only.⁹⁵

36. There has been a considerable number of cases in New York upon the point, what is a sufficient charge upon the devisee to carry a fee by implication. It is held sufficient if the devisee is required to give money to another.⁹⁶ Where the charge is met by some other equivalent, it will not enlarge the devise by implication.⁹⁷ But if the charge exceeds the aid, it will give a fee.⁹⁸

37. The Revised Statutes in New York have placed this matter very nearly upon the ground of the present English statute.⁹⁹ It is now held, that a general devise passes all the testator's estate, unless a different intent appears, and consequently a general devise passes the fee; and the fact of the testator providing an annual allowance to the devisee to keep the estate in repair will not be a sufficient ground to declare it only a life-estate.¹⁰⁰

38. The rules of law are probably substantially the same as at common law, in most of the American states. In Massachusetts¹⁰¹ it has been decided, that a devise of "all the residue and remainder of my real estate" passes a fee, though no words of limitation or inheritance are added; and that a devise of real estate, without words of inheritance, passes a fee, if the devisee

⁹⁴ *Bradstreet v. Clarke*, 12 Wend. 602.

⁹⁵ *Edwards v. Bishop*, 4 N. Y. 61; *s. p.* *Jackson v. Bull*, 10 Johns. 148; *Lippen v. Eldred*, 2 Barb. 130. A devise with power of disposition, although providing for an ultimate remainder of what remains undisposed of at the death of the first taker, vests a fee, or else a life-estate, with power to convey the fee. *Lyon v. Marsh*, 116 Mass. 232.

⁹⁶ *Barheydt v. Barheydt*, 20 Wend. 576.

⁹⁷ *Burlingham v. Belding*, 21 Wend. 463.

⁹⁸ *McLachlan v. McLachlan*, 9 Paige, 534. See *Jackson v. Robins*, 16 Johns. 586, 889.

⁹⁹ 1 Rev. Stat. 748, § 1.

¹⁰⁰ *Fuller v. Yates*, 8 Paige, 325; 4 Kent, Com. 535-537. Some of the late cases in New York seem to regard the rule in *Shelley's* case substantially abolished in that state. *Freeborn v. Wagner*, 41 N. Y. (4 Keyes) 27; *Warfield v. Crane*, id. 448; *Sheridan v. House*, id. 569.

¹⁰¹ *Parker v. Parker*, 5 Met. 134; *Godfrey v. Humphrey*, 18 Pick. 537.

is personally charged in the will with the payment of money to * a third person.¹⁰⁰ In another case¹⁰² the court held, * 336 that the following terms in a will, "all my estate both real and personal, reserving only sufficient to pay my just debts," carry a fee, without words of limitation, by force of the word "estate." And in another case,¹⁰³ where no words of inheritance were used, from other portions of the will, and from the value of the estate as estimated by the testator, being that of the fee, that was held to pass.

39. In some of the states, the general terms "property" and "estate" have received a much more restricted construction.¹⁰⁴ In the first case just cited, the court are made to say that the word "property" does not include choses in action, but only personalty in possession; and in the later case of *Hurdle v. Outlaw* the court seem to regard the expression, "all my property of every description," as limited to personalty, but as being sufficient to constitute "a universal legatee." In a still later case¹⁰⁵ it is held that a limitation by will to one upon the contingency of arriving at a particular age, or marriage, manifested an intention to have the devisee take an estate in fee upon arriving at the prescribed age, or being married. But it was held in *Clark v. Hyman*,¹⁰⁶ that a bequest of "all my property and possessions," followed by an enumeration of "personal and perishable," with the direction to pay the testator's debts out of it, "to have and to hold to them and their heirs and assigns for ever," did not pass real estate.

40. It has been held that a devise of "my land" to a county, to establish schools, passes a fee, since nothing less would be commensurate with the trust declared.¹⁰⁷ But a power of sale attached to an express life-estate will not have the effect to enlarge it to a fee.¹⁰⁸

41. The word "heirs," in connection with the word "issue," will be regarded as meaning heirs of the body, and will

¹⁰² *Tracy v. Kilborn*, 3 Cush. 557. The wife was here made sole executrix; but that fact is not regarded as important.

¹⁰³ *Baker v. Bridge*, 12 Pick. 27. See also *Cook v. Holmes*, 11 Mass. 528.

¹⁰⁴ *Pippin v. Ellison*, 12 Ired. 61; *Hurdle v. Outlaw*, 2 Jones, Eq. 75.

¹⁰⁵ *Gray v. Winkler*, 4 Jones, Eq. 308; *Holderby v. Holderby*, id. 241.

¹⁰⁶ 1 Dev. 382.

¹⁰⁷ *Bell County v. Alexander*, 22 Texas, 350.

¹⁰⁸ *Dean v. Nunnally*, 36 Miss. 358.

* 337 create an * estate tail in real estate.¹⁰⁹ But any words which, applied to real estate, would create an estate tail, will, when applied to personalty, give the first taker an absolute estate; and any remainder over is void. *Shaw*, Ch. J., here says, "It will be found, we believe, in all the cases, that, where a gift over of personal estate has been maintained, it is where the gift to the first taker is by the terms of the bequest, not exceeding a gift for life."¹¹⁰

42. It has been held in Pennsylvania,¹¹¹ that where the testator gave his son a tract of land, without words of inheritance, to take effect after the death of his widow, giving other land to be sold and the avails divided among other children, that the son took a fee-simple. And where the testator, in the introductory part of his will, expressed the purpose of making an entire disposition of his estate, and devised land to one during his natural life, and after his decease to his children, it was held to give the remainder-men a fee.¹¹² And a general devise to one of the testator's children when she arrived at full age, with a restriction upon all the children as to conveying their portion of real estate, but directing them to receive the rents during life, and, after their death, that their portion should be divided among their children and their heirs, and if any of the children died without issue, then among the survivors, was held to create an estate in fee-simple.¹¹³ So also, where the devise was for life, and to children or their issue after the death of the first taker, it was held to create a fee-simple.¹¹⁴

¹⁰⁹ *Albee v. Carpenter*, 12 Cush. 382.

¹¹⁰ *Ellis v. Merrimack Bridge*, 2 Pick. 243; *Homer v. Shelton*, 2 Met. 194, and cases there cited. The same rule obtains in Tennessee. *Clark v. Clark*, 2 Head, 336. But an estate in remainder in personalty may be created, as well as in the realty, when such appears to be the intention of the testator. *Smith v. Bell*, 6 Pet. 68; *Keating v. Reynolds*, 1 Bay, 80. But the general proposition of the text is most unquestionable, that a bequest of personalty, in the same terms which will create an estate tail in the realty, will give an absolute title to the first taker. *Ex'rs of Moffat v. Strong*, 10 Johns. 12; *Paterson v. Ellis*, 11 Wend. 259. An executory devise in personalty is valid. *Dunn v. Bray*, 1 Call, 294.

¹¹¹ *Hall v. Dickinson*, 31 Penn. St. 76. It is here said that the word "heirs" is not necessary to create a fee-simple estate by will, when there are other expressions which show that intention.

¹¹² *Gernet v. Lynn*, 31 Penn. St. 94.

¹¹³ *Naglee's Appeal*, 33 Penn. St. 89.

¹¹⁴ *McKee v. McKinley*, 33 Penn. St. 92; *McGill's Appeal*, 61 Penn. St. 46.

A devise to one for life, with remainder to his heirs, creates a fee-simple.¹¹⁴

* 43. A devise, expressed to be in fee-simple for life, will * 338 create an absolute fee-simple.¹¹⁵ The word "children" used in a devise, as to one during life, and after his decease to his children, the children being alive at the time the will takes effect, must be regarded as expressive of testator's bounty to them. They therefore take as purchasers.¹¹⁶ And where, in a will, which evidently contemplated the entire disposition of the testator's estate, certain real estate was given to one of the testator's children, without words of inheritance, but charged with certain payments and annuities, it was held to create an estate in fee-simple, notwithstanding a provision, that if any of the devisees should die unmarried, or without issue, his or her share should revert to the general estate.¹¹⁷ And in a devise to the testator's widow of all his personal and real property, "so long as she lives, for her maintenance," adding, "she shall have her choice to sell it or not, as she believes best for her," and in another portion of the will, "with the third part of his estate she could do and bequeath to whom she pleases," it was held to give her a freehold of the whole estate during life, and one-third thereof absolutely.¹¹⁸ The rule in Shelley's case seems to be in force in Delaware.¹¹⁹ But in all the American states, or nearly all, there has been considerable hesitation in regard to accepting and applying this rule to the fullest extent. It was always regarded in England as an artificial rule of construction, and one which tended to defeat the intent of the testator; and it has not received the unqualified indorsement of the English courts, in regard to devises. We should regret to find the American courts going further in the rigid application of such an unnatural rule of construction to devises than such English judges as *Mansfield* and *Wilmut* were willing to go. Our own views in regard to the proper application of this rule, in those of the American states where no statutory provisions upon the subject

And the rule is the same where such intent is shown by circumlocution. *Lytle v. Beveridge*, 58 N. Y. 593.

¹¹⁵ *M'Allister v. Tate*, 11 Rich. Law, 509.

¹¹⁶ *Gernet v. Lynn*, 31 Penn. St. 94.

¹¹⁷ *Schoonmaker v. Stockton*, 37 Penn. St. 461.

¹¹⁸ *Musselman's Estate*, 39 Penn. St. 469.

¹¹⁹ *Griffith v. Derringer*, 5 Harring. 284.

exist, will be found fully expressed in two cases in Vermont.¹²⁰

¹²⁰ *Blake v. Stone*, 27 Vt. 475; *Smith v. Hastings*, 29 Vt. 240. In the first of these cases we said:—

“As we have a statutory system of conveyance or transmission of the title of real estate, wherein we have, more or less explicitly, departed from many of the common-law provisions upon the subject, it deserves serious consideration, in my judgment, whether we should make any distinction between a covenant to convey, a will or devise, and a deed, in regard to the indispensable necessity of the use of the word ‘heirs,’ to create a fee-simple or fee-tail, or whether that word is always to be regarded as one of *limitation*, and never of *purchase*, in a deed, without reference to the clearly expressed intention of the parties. The question, as it affects deeds, will probably ultimately settle down, upon the same basis it has, at common law, in regard to covenants and devises, as one of intention merely. Justice *Wilmot* says, in *Long v. Laming*, 2 Burr. 1100: ‘Now, it is certain that in some cases, and under some circumstances, they (the words “heir” and “heirs”’) may be construed words of purchase, either upon a will or upon a deed.’ And to this effect he cites two cases, — *Lisle v. Gray*, found in *Sir Th. Jones*, 114, s. c. 2 *Levinz*, 223, s. c. *Pollex*. 582, s. c. *Th. Raymond*, 278, and *Walker v. Snowe*, in *Palmer*, 359, — and concludes: ‘They are not to be construed as words of limitation, either upon a will or upon a deed, when the manifest intention of the testator or of the parties is declared to be, or clearly appears to be, that they shall not be so construed.’ This is sufficiently explicit; but however sensible and sound, as a rule of exposition, it has not generally obtained, in England, in regard to deeds. . . . As every one feels the absurdity of any such distinction, between deeds and other instruments. But it does not seem to us necessary to put this case upon the broad ground of intention merely. The English cases treat this case as an exception. The case of *King v. Melling*, 1 Vent. 231, where the devise was to one for life, et non aliter, and this was held sufficient to give only a life-estate in the first grantee. So, too, *Archer’s case*, without negative words, but only because the remainder is given over to the heir male in the singular number, regards the heir as taking by *purchase*, and not by *inheritance*. And *Bagshaw v. Spencer*, before Lord *Hardwicke* (2 *Atkins*, 577, and 1 *Ves. Sen.* 142), is decided as conveying to the first grantee only a life-estate, because the words, ‘without impeachment of waste,’ are used, which have no application to an estate of inheritance. But, if such words may determine the extent of the estate, so may others equally indicative of intention. Other cases may be referred to in Judge *Reeve’s* dissertation upon this subject. Dom. Rel. Appendix, 453.” The following suggestions upon the point are made in *Smith v. Hastings*, supra: “This question seems to involve, to some extent, the rule in *Shelley’s case*. 1 *Coke*, 93 a, 88 b. This question was somewhat examined in a late case, — *Blake v. Stone*, 27 Vt. 475. It was there considered that the rule in *Shelley’s case* was to be regarded as of no special force in this state, except as one of construction and intention. This was the view taken of the

* 44. In Connecticut, the rule in Shelley's case seems to * 339 have been regarded as in operation, in a somewhat modified form, until * its abrogation by statute.¹²¹ It was first recog- * 340 nized in *Bishop v. Selleck*,¹²² and subsequently acted upon

same rule in England, by Lord *Mansfield* and Justice *Wilmot*, in *Doe v. Laming*, 2 Burr. 1100, and by Justice *Blackstone*, in *Perrin v. Blake*, 4 Burr. 2579. This is that celebrated case so long pending in the King's Bench and Exchequer Chamber, upon the extent of the rule in Shelley's case, that when the ancestor by any conveyance takes an estate for life, with remainder mediately or immediately to his heirs, in fee or in tail, the estate shall vest absolutely in the first grantee or devisee, and no estate remain which is secured by the deed to the heirs; in other words, the term 'heirs' in such case is to be regarded as one of *limitation*, and not of *purchase*. The court here were so divided, that the case was not decided; and the amount of discussion and acrimonious controversy which ensued upon the subject is almost incredible. See *Bridg. Leg. Bibliog.* p. x., where this is suggested as the origin of *Fearne on Cont. Rem. & Ex. Dev.* And Lord *Campbell* says, in his *Life of Lord Mansfield*, that, even to this day, nothing will so readily provoke debate among English lawyers as to start the query, whether *Perrin v. Blake* was rightly decided by the majority of the King's Bench. But it seems always to have been held in England that where the language of the instrument manifested a clear intention to have the estate pass to the heirs, and that the ancestor should take only a life-estate, it should be allowed to have that operation, certainly where this is unquestionably so expressed. It is, indeed, held in England that all doubts shall in such case be solved against such construction. But this extreme rule of construction, in favor of the absolute right of the ancestor to alien the property, is obviously a rule of policy merely, and has been supposed to derive its chief support from considerations having their origin in the feudal tenures of the realm. But here no such considerations can have weight. And as our system of conveying is statutory, there is no necessity and no reason in adopting any rule of construction which will tend to carry us one side of the true purpose and intention of the instrument. 'And this,' says Prof. Greenleaf (2 *Greenl. Cruise*, 381, 4 *Cruise*, 305, and note), 'was deemed by the late lamented Judge *Story* to be generally adopted in the United States, where the subject was not regulated by statute.' See also 4 *Kent's Comm.* 215, 233." The rule in Shelley's case has been often criticised and condemned in England. *Papillon v. Voice*, 2 P. Wms. 471, by Sir *J. Jekyll*, M. R.; *King v. Melling*, 1 Vent. 225, by *Rainsford* and *Twisden*, JJ.; *Legate v. Sewell*, 1 P. Wms. 87, by *Tracy*, J.; *Long v. Laming*, 2 Burr. 1100, 1111, 1112, by Lord *Mansfield*, Ch. J., and *Denison* and *Wilmot*, JJ.; *Goodtitle v. Herring*, 1 East, 264, by Lord *Kenyon*, Ch. J. The United States Supreme Court make a very reasonable application of the rule in *Daniel v. Whartenby*, 17 Wall. 639. See also *Clarke v. Boorman's Ex'rs*, 18 id. 493.

¹²¹ Stat. of 1821.

¹²² 1 Day, 299.

in many other cases.¹²³ *Bissell, J.*, in the case of *Goodrich v. Lambert*, adopts the language of Sir *Wm. Blackstone's* argument in *Perrin v. Blake*.¹²⁴ "The true question of intent will turn, not upon the quantity of estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs of his body. That the ancestor was intended to take an estate for

life is certain; that his heirs were intended to take after

* 341 him is equally certain; but how * those heirs were intended to take, whether as descendants or as purchasers, is the question. If the testator intended they should take as purchasers, then the ancestor only remained tenant for life; if he meant they should take by descent, or had formed no intention about the matter, then, by consequence and operation of law, the inheritance first vested in the ancestor." This is unquestionably a very lucid statement of the point, according to the English law. But it seems to us the true distinction should be made to turn upon the inquiry whether the word "heirs" was used to designate certain persons intended to be benefited by the deed or devise, and which were in the mind of the grantor or devisor, in a general way at least, or was used merely as defining the character of the estate which it was intended should vest in the first taker. And with this qualification we would not object that such cases as created serious doubts should be controlled by the rule in *Shelley's* case. But beyond this it seems to us the rule has no just application to deeds even, and surely not to devises. And the fact that in all the American states, where the rule has been carried beyond this reasonable limit, the legislatures have interfered and repealed it, goes to show very satisfactorily that it has no just foundation, either in principle or in the instinctive perceptions of the people.

45. The rule has been supposed by some to have been rejected in Pennsylvania at an early day,¹²⁵ and was only adopted in

¹²³ *Goodrich v. Lambert*, 10 Conn. 448. See also *Everts v. Chittendon*, 2 Day, 338; *Hungerford v. Anderson*, 4 id. 368.

¹²⁴ *Hargrave's Law Tracts*, 504. In one case "heirs male" were construed words of purchase, and not of limitation. *Hamilton v. Wentworth*, 58 Me. 101. In Kentucky such words in a will import a fee, since estates tail are abolished. *Breckinridge v. Denny*, 8 Bush, 523. But see *Sale v. Crutchfield*, id. 636.

¹²⁵ *Findlay v. Riddle*, 3 Binn. 139. But, in a very late case in this state, the question is thoroughly reviewed by *Strong, J.*, and the declaration made that

New * York,¹²⁶ to be abolished by statute.¹²⁷ And it is idle * 342
to argue, that it is a rule of construction which can ever be

“the rule in *Shelley's* case is the law of Pennsylvania,” but with such modifications and “variations” as to deprive it of all fatal virus. We cannot better give the present state of the law in that state upon this long-agitated and much-vexed question than in the language of the court in *Guthrie's Appeal*, 37 Penn. St. 9, 21: “If the words ‘or their heirs’ are to be regarded as words of limitation of the estate given to the remainder-men, then they settle the question. That words of distribution, with words of limitation superadded, show that the remainder-men take not as heirs even, though described as such, but as a new root of succession, is too well established for controversy. *Doe v. Laming*, 2 Burr. 1100; *Right v. Creber*, 5 B. & C. 866; *Greenwood v. Rothwell*, 5 Man. & Grang. 628; *Findlay v. Riddle*, 3 Binn. 139; *Stump v. Findlay*, 2 Rawle, 168; *Abbott v. Jenkins*, 10 S. & R. 296. If, on the other hand, the words ‘or their heirs’ are to be regarded, as subsequently explained, to mean the child or children of deceased children, then there is nothing that looks to succession, nothing that looks beyond the individuals that might be in being at the death of *Elizabeth Bones*. The rule in *Shelley's* case is the law of Pennsylvania; but there is no reason why it should be applied more extensively than in the country from which it derived its birth. It often defeats the declared will of a testator, and frustrates his purpose of making provision for more than one generation of his family. Still it is to be enforced whenever it is truly applicable. But it has been held from *Wylde's* case, 6 Coke, 16 b, down to the present day, that when the devise of the remainder is not to ‘heirs’ or ‘heirs of body,’ but to ‘children,’ they take as a new stock, and not as heirs. In *Goodtitle v. Herring*, 1 East, 264, there was a limitation for life, with a remainder to the ‘heirs male of the body,’ of the tenant for life severally, successively, one after another, as they and every of them should be in seniority of age and priority of birth, the elder of such sons and the heir male of his body being always preferred before the younger of such son or sons, and the heir male of his and their body or bodies; and for want of such issue, then to the daughters, &c.; and in default of such issue, over. The description embraced the whole line of lineal heirs, preferring them in the order of common-law descent, and they were described as ‘heirs male of the body;’ yet, as they were also called sons, the latter designation overcame the force of the technical words of limitation, and the parent took but an estate for life. See also *North v. Martin*, 6 Sim. 266; *Doe v. Provoost*, 4 Johns. 61; *Gernet v. Lynn*, 7 Casey, 94. The latter case is very like the present. In it the late Chief Justice *Lewis* remarks: ‘It is therefore very clear that when the term “children” is used to designate the object of the testator’s bounty, and some of them are in esse at the date of the will, and also at the time it takes effect, neither the policy nor the words of the rule apply.’ After a pretty

¹²⁶ *Brant v. Gelston*, 2 Johns. Cas. 384.

¹²⁷ 1 Rev. Stat. 725.

* 343 made acceptable * to any people, except upon the ground that it has so long been the received law of property, that

thorough search, I have not been able to find a single such case in which the rule has been applied, prior to *Williams v. Leech*, 4 Casey, 89; and even in that case there were no children of the first taker at the date of the will, nor even when it took effect. That case, however, does treat the word 'children' as if it meant 'heirs' in the will then before the court. It was followed by *Naglee's Appeal*, 9 Casey, 89, a construction of the same will; and by *McKee v. McKinley*, 9 Casey, 92. In the former of the cases, there was, in the first place, an absolute gift of the fee-simple to the daughter of the testator, then unmarried and without children. In a subsequent part of the will, the testator provided that none of his children should sell or convey any of the real estate devised to them, but enjoy it during life; and that after their death it should be divided equally among their children and their heirs. This was followed by a devise over to the surviving children, if either of his children should die 'without issue.' It might have been argued, though I think unsuccessfully, that the testator had used the words 'issue' and 'the children' as of the same import. The decision, however, was not put upon that ground. The will was regarded as a gift of the fee to the first taker, followed by an unavailing attempt to restrict alienation. It was also quite strongly intimated that it might be an estate tail in the daughter. The case of *McKee v. McKinley* was that of a devise for life, remainder to the children of the tenant for life, if any surviving, or issue of such children; and in case of no children or issue of such children, then over to the relations and lawful heirs of the testator. This was held an estate in fee-simple in the first taker. The case was evidently an amicable one. There appears to have been no argument except in support of a tenancy in fee of the first taker, and the decision was by a bare majority of the court. Neither this case, nor that of *Williams v. Leech*, nor *Naglee's Appeal*, in the particulars of which we have spoken, is sustainable on authority. If they are to be regarded as the law of the land, the result must be a wide disturbance of titles, the foreshadowings of which are already to be seen, — an extension of the rule in *Shelley's* case far beyond all precedent, and an insuperable obstacle in the way of testators against making such settlements of their property as have been common ever since statutes of wills existed. Enough has, however, been said, to show, that, under the will of Robert Harris, Elizabeth Bones took only an estate for life, and, consequently, that the decree of the Orphans' Court was correct." And the same question is again discussed in *Chew's Appeal*, 37 Penn. St. 23, and the proposition maintained, that, when the intention of the testator requires it, the words "heirs" and "heirs of the body" may be divested of their technical and usual meaning as words of limitation, and converted into words of purchase; which is all for which we contend, and is a very essential qualification of the rule in *Shelley's* case, as illustrated by the leading English cases, as applicable to deeds, and is in exact consonance with the opinion of Lord *Mansfield* and Mr. Justice *Wil-mot*, ante, n. 120; but it may not depart so widely from the English rule applied to devises and covenants.

any departure from it would be liable to be attended with disastrous consequences.

46. The courts in Connecticut incline to favor such construction of general devises as will uphold the presumed intention of the testator to give the whole interest and title which he possessed. Thus a devise to the testator's widow for life, and remainder to his daughter, with directions to the executors to sell the same for her benefit, if they thought best, and, if not sold, the use to be to her for her benefit, the executors not disposing of the estate, it was held the daughter took an estate in fee.¹²⁸

47. Plain words of devise, or necessary implication, are * requisite to disinherit the heir.¹²⁹ It has been held that a * 344 general devise of wild uncultivated lands, without words of inheritance, will carry the fee, since there is no income arising from the use of such lands.¹³⁰ And a devise to the heir is inoperative unless it differ from the estate which he would take by descent.¹³¹

48. The word "estate" is held in the American courts as a word of the greatest extension, and comprehends every species of property real and personal,¹³² and will carry a fee unless restrained. It describes both the corpus and the extent of interest.¹³³

49. But general words of devise, without words of inheritance or any thing in the will to show that an estate of inheritance was

¹²⁸ *Ingersol v. Knowlton*, 15 Conn. 468 ; s. p. *Cordry v. Adams*, 1 Harrington, 439 ; *Pattison v. Doe*, 7 Ind. 282 ; *Allen v. Hoyt*, 5 Met. 324. So a devise of land for the devisee to hold and dispose of as she may think best, and no other person to have any claim whatever, vests in her a fee-simple. *Culbertson v. Duly*, 7 W. & S. 195 ; *Willis v. Bucher*, 3 Wash. C. C. 369 ; *Stoevers v. Stoevers*, 9 S. & R. 434 ; *Harris v. Slaght*, 46 Barb. 470.

¹²⁹ *Roosevelt v. Heirs of Fulton*, 7 Cow. 71 ; s. c. 6 Cow. 48 ; *Jackson v. Burr*, 9 Johns. 104.

¹³⁰ *Sargent v. Towne*, 10 Mass. 303 ; *Russell v. Elden*, 3 Shep. 193. And the condition of the land may be proved by extrinsic evidence in aid of the construction. *Sargent v. Towne*, supra.

¹³¹ *M'Affee v. Gilmore*, 4 N. H. 391 ; *Fogg v. Clark*, 1 N. H. 163 ; *Enlaws v. Enlaws*, 3 A. K. Marsh. 228.

¹³² *Lambert v. Paine*, 3 Cranch, 97 ; *Archer v. Deneale*, 1 Pet. (U. S.) 585 ; *Beall v. Holmes*, 6 Har. & J. 205 ; *Jackson v. DeLancey*, 11 Johns. 365 ; s. c. 13 Johns. 537.

¹³³ *Davies v. Miller*, 1 Call, 110 ; *Kennon v. M'Roberts*, 1 Wash. 96 ; *Watson v. Powell*, 3 Call, 306 ; *Wyatt v. Sadler*, 1 Munf. 537 ; *Johnson v. Johnson*, id. 549 ; *Philips v. Melson*, 3 id. 76.

intended, will only pass a life-interest.¹³⁴ The words, "all I possess indoors and outdoors," will carry a fee.¹³⁵ And any other words which show such intent.¹³⁶

50. The word "appurtenances" may have a more extended operation in carrying distinct and independent interests in a devise than it could have in a deed.¹³⁷ And a condition attached to the devise, as that the devisee shall do some act, as to convey land to another, either a part of the same land, or other land, will have the effect to enlarge a general devise, so as to pass a fee.¹³⁸

* 345 * 51. It was held in the Supreme Court of the United States,¹³⁹ that a bequest to the testator's wife of "all my personal estate," &c., "which personal estate I give and bequeath unto my said wife to and for her own use and benefit and disposal absolutely, the remainder of said estate after her decease to be for the use of Jesse Goodwin," testator's son, that those words gave the remainder of the estate after the wife's decease to the son with as much certainty as the preceding words gave the whole estate to the wife; that the intent to make a provision for the son was as clearly expressed upon the face of the will as that of making a provision for the wife; that, if full effect is given to the latter, the former is expunged from the will; that, all the words of the will were equally the language of the testator; that the court were not at liberty to set aside the last words of the instrument, any more than those that came earlier; that the whole will is to be taken together, and so construed as to give effect to every portion of it, if possible: "the limitation in remainder shows, that in the opinion of the testator the previous words had given only an estate for life; this was the sense in which he used them; and it was his intention to give the personal estate to his son, after the death of his mother."

¹³⁴ *Beall v. Holmes*, 6 Har. & J. 205; *Edelen v. Smoot*, 2 Har. & G. 285; *Owings v. Reynolds*, 3 Har. & J. 141; *Lyles v. Digge*, 6 id. 364; *Smith v. Poyas*, 1 Desaus. 156; *Keith v. Perry*, id. 353; *Hall v. Goodwyn*, 2 Nott & McCord, 383; *Lindsay v. M'Cormack*, 2 A. K. Marsh. 229.

¹³⁵ *Tolar v. Tolar*, 3 Hawks, 74.

¹³⁶ *Campbell v. Carson*, 12 S. & R. 54.

¹³⁷ *Otis v. Smith*, 9 Pick. 293; *Jackson v. White*, 8 Johns. 59; *Grant v. Chase*, 17 Mass. 443.

¹³⁸ *Gibson v. Horton*, 5 Har. & J. 177; *Beall v. Holmes*, 6 id. 205; *Decker v. Decker*, 3 Ham. 157.

¹³⁹ *Smith v. Bell*, 6 Pet. 68; s. p. *Carr v. Dings*, 58 Mo. 400.

52. A power of sale attached to a life-estate will not have the effect to enlarge it to a fee.¹⁴⁰ And a direction that the devisee shall have the sole use of the estate, and that at her death it shall go to her children, but if they are not raised, then to her husband and others, creates only a life-estate in the first devisee.¹⁴¹ And a devise of land to the testator's son, without words of limitation or perpetuity, except a provision that the testator's wife shall be master of one-third of the estate during life and widowhood, and, after her marriage or death, "to be and belong to my aforesaid son," was held to create only a life-estate.¹⁴²

53. The expression "worldly goods of all sorts and kinds," though very general, has been held to be properly applicable to personal estate only.¹⁴³ But that and similar expressions, in the * preamble of a will, showing a purpose of disposing * 346 of all one's estate, may often aid the construction of other portions of the instrument,¹⁴⁴ and will have the effect to convert a general devise of real estate, without words of inheritance, into a fee-simple.¹⁴⁵ But such aids are resorted to only, as a general rule, where the language of the will is obscure or ambiguous.¹⁴⁶ But general prefatory words in a will are inoperative in themselves, unless there are subsequent words which they aid in giving a definite import.¹⁴⁷

54. It was held, in a very late case in Pennsylvania, that where the testator devised all his estate, real and personal, to his wife for life, and then provided that after his death she should have

¹⁴⁰ *Dean v. Nunnally*, 36 Miss. 358.

¹⁴¹ *Jossey v. White*, 28 Ga. 265.

¹⁴² *Van Derzee v. Van Derzee*, 30 Barb. 331. The American cases upon this point are too numerous to be digested in an elementary treatise, as they neither create or illustrate a new principle or in a new form, and are no guide to the determination of other cases.

¹⁴³ *Bradford v. Bradford*, 6 Whart. 236.

¹⁴⁴ *Busby v. Busby*, 1 Dall. 226.

¹⁴⁵ *Clark v. Mikell*, 3 Desaus. 168; *Goodrich v. Harding*, 3 Rand. 280; *Watson v. Powell*, 3 Call, 306; *Winchester v. Tilghman*, 1 Har. & McH. 452; *Geyer v. Wentzel*, 68 Penn. St. 84.

¹⁴⁶ *Howland v. Union Theological Seminary*, 3 Sandf. S. Ct. 82; *Davies v. Miller*, 1 Call, 127; *Beall v. Holmes*, 6 Har. & J. 205; *Finlay v. King*, 3 Pet. (S. C.) 346; *Olmsted v. Harvey*, 1 Barb. 102.

¹⁴⁷ *Weidman v. Maish*, 16 Penn. St. 504.

full power to do with his property "as she pleases," that this created an absolute gift of the personal estate.¹⁴⁸

55. A devise of one-seventh of the testator's estate to his insolvent son, in trust for his children, at his decease, with power to invest the same in business for the benefit of the trust, without subjecting the same to any debts, except such as should be contracted in the execution thereof, and providing, that, if the son should execute personally the trust thereby committed to him, he should be allowed a reasonable support out of the trust-fund for his personal services rendered, was held to vest in the son no beneficial interest which was liable to execution for his debts.¹⁴⁹

56. And where, by a will which evidently contemplated the distribution of the whole of the testator's real and personal property among his children, certain real estate was given to one of them, charged with the payment of an annuity to the testator's widow, and sundry payments to his other children, it was held that the

* 347 * devisee took an estate in fee-simple, although there were no words of inheritance, and the will provided that if any of the devisees should die unmarried, or without issue, his or her share should revert to the testator's general estate.¹⁵⁰

57. But in a case¹⁵¹ where the testator directed his executors to account for and pay over to his three daughters, half-yearly, "and to each of them, during their natural lives, the income of

¹⁴⁸ Diehl's Appeal, 36 Penn. St. 120, citing *In re Maxwell's Will*, 24 Beav. 246. See also *Downing v. Johnson*, 5 Coldw. 229.

¹⁴⁹ *Brown v. Williamson's Ex'rs*, 36 Penn. St. 338. See also *Williams v. Leech*, 28 Penn. St. 89, which was here held to have no application, unless a beneficial interest vested in the first taker. See also *Holdship v. Patterson*, 7 Watts, 547; *Ashurst v. Given*, 5 W. & S. 323; *Norris v. Johnston*, 5 Penn. St. 287; *Eyrick v. Hetrick*, 13 Penn. St. 488.

¹⁵⁰ *Schoonmaker v. Stockton's Adms.* 37 Penn. St. 461. See also *Brown's Estate*, 38 id. 289.

¹⁵¹ *Haldeman v. Haldeman*, 40 Penn. St. 29. The argument of the court by which this result was reached is entirely sound, if we consider their purposes; but it seems to us the facts of the case were such that the court might have regarded the word "descent," with reference to the children of the daughters, as defining the transmission of the estate from the testator to them, and not from the mother to her children; under which construction the children would have taken as purchasers under the will, upon the termination of the life-estate of the mother, and thus the intention of the will would have been much more surely effected.

their share of the residue, and after the death of either, then to descend and go to the child, and if children, share and share alike; should, however, either of my daughters die, and leave no lawful issue, then such share or portion is to fall back again to the residue, and form a part of the same;" it was held that the daughters took an estate tail in the residue, which, by the statute of that state, became a fee-simple.

58. But in a later case,¹⁵² where the testator devised one equal ninth part of his estate to one of his daughters during the term of her natural life, and at or immediately after her death to "her children in fee, but if she should die without leaving children, then to her brothers and sisters, their heirs and assigns for ever," and at the time the will was made, and up to the death of the testator, she had no children, but had children afterwards, it was claimed on her part that she took an estate tail; but the court held that she took only a life-estate, and that her children took the remainder as purchasers under the will.

59. And in another case,¹⁵³ where the devise was to the testator's son, during his natural life and that of his present wife, and directed that after their decease "the said tract of land descend to their heirs jointly, and their heirs and assigns for ever, or to such of them as may be then living," it was held to create * a * 348 fee-simple in the first taker, upon the ground that there was not sufficient to control the natural force of the word "heirs," which must, therefore, be construed as one of limitation, and not of purchase. The only comment which it is needful to make upon the last three cases is, that they were all unquestionably intended to create life-estates in the first devisees, with estates over in remainder in fee; and that two of them, by a professed, and probably an actual, adherence to the force of a technical rule, were decided contrary to the actual intention of the testator. This is a result not always to be avoided, but one always to be regretted, and avoided if possible.

60. In another case the devise was to the testator's son S., his "heirs and assigns for ever," subject to the payment of a sum of money to a daughter of the testator; adding, "If, however, S. should die without issue, then the land to descend to and vest in

¹⁵² Cote v. Von Bonnhorst, 41 Penn. St. 243.

¹⁵³ Criswell's Appeal, 41 Penn. St. 288.

three other sons named, provided S. should not make sale of it; but if the said S. should sell the aforesaid property, he may grant and assign it as he likes." In January, S. and wife, by deed, purporting to be for valuable consideration, sold and conveyed the land to an uncle, who, in May following, by indorsement on the deed, for a valuable consideration, assigned it and the land back to S. The consideration in both cases was in fact merely nominal. S. held the land till he died, leaving no issue nor widow, having devised the land. One of the brothers to whom the devise over was made brought ejectment for the land; and it was held, that, by the sale to the uncle and reconveyance as above stated, the devise over was defeated, and the absolute title vested in S., which by his will passed to the devisee.¹⁵⁴

61. In Ohio the devise of "the plantation on which I now live" was held sufficient to carry a fee. *Bartley*, Ch. J., said, "If the expressions used in a will, as descriptive of the estate, are general, and sufficient to comprehend the whole property or estate, without any words of limitation, or other provision of the will qualifying the quantity of interest devised, a fee in the land passes."¹⁵⁵

* 349 * 62. The present statute of Massachusetts¹⁵⁶ provides that "every devise of land in a will made after the date prescribed shall be construed to convey all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that the devisor intended to convey a less estate." Before this statute came in force there, the courts held the rule of the English law, under the statute of frauds, that a devise without limitation should be construed to convey only a life-estate, unless a different intention appeared in the will.¹⁵⁷ In a will made before the present statute,¹⁵⁸ the court held that the word "estate,"

¹⁵⁴ *Barnet v. Deturk*, 43 Penn. St. 92. A devise to the testator's wife, "for her use and comfort, and to be disposed of as she pleases, at or before her decease, when no doubt she will make such disposition of the same among our children as she may then think most proper," was held to create an absolute fee-simple, without any trust for the children of the testator. *Kinter v. Jenks*, 43 Penn. St. 445.

¹⁵⁵ *Thompson's Lessee v. Hoop*, 6 Ohio N. S. 480, 488.

¹⁵⁶ Gen. Stats. ch. 92, § 5.

¹⁵⁷ *Baker v. Bridge*, 12 Pick. 27; *Godfrey v. Humphrey*, 18 Pick. 537.

¹⁵⁸ *Leland v. Adams*, 9 Gray, 171. The English cases upon this point are here carefully reviewed by Mr Justice *Metcalfe*.

although accompanied by words of locality, passed a fee, unless controlled by other parts of the will.

63. In a late case,¹⁵⁹ the testator devised one-third part of a certain farm to each of his three daughters, conditioned that, if his executor should think best to sell the farm, he should have full power to do so, and to convey the title, and in that event the daughters should each be entitled to receive one-third part of the proceeds of the sale. After the making of the will, the testator sold the farm, and received payment for the same; and it was held the daughters were entitled to legacies equal to one-third the purchase-money paid for the farm.

* 64. There are a large number of cases in the books, bearing more or less upon the rule in Shelley's case, and which to some extent illustrate its application, which we have not referred to. But these decisions, like many of those already cited, are more characterized by the views of policy entertained by the courts deciding them than by any appreciable approximation toward any definite rule of construction. Thus, in *Dott v. Cunningham*,¹⁶⁰ a

¹⁵⁹ *Clark v. Packard*, 9 Gray, 417. This is a very just but rather a forced construction of the will, as it appears to us. In *Fay v. Fay*, 1 Cush. 93, under the present statute, it was held that the intent of the testator to convey less than a fee by the words of a devise need not be declared in express terms, but it will be sufficient if it appear from the whole will that such must have been the testator's purpose. Thus where the testator devised portions of his real estate in fee by appropriate words, but gave his widow in lieu of dower the use and improvement of one-third of his real estate, it was held sufficient ground of presumption against any intent to give her the fee. *Ib.* And a bequest of the improvement of shares in a bridge corporation to the testator's daughter, and at her death to be equally divided among her heirs, was held to create only a life-estate in the daughter, and the absolute property to belong to her children after her decease, by way of remainder or executory devise. *Ellis v. Essex Merrimack Bridge*, 2 Pick. 243. See also *Willcut v. Calnan*, 98 Mass. 75. The statute of South Carolina, in regard to the effect of a general devise of land, is similar to the present English statute and that of Massachusetts. But the act was not retroactive. *Payton v. Smith*, 4 McCord, 476.

¹⁶⁰ 1 Bay, 453; *s. r.* *Moore v. Brooks*, 12 Gratt. 135; *Williams v. Foster*, 3 Hill, S. C. 193. So a bequest of personalty to two persons as tenants in common, and their respective heirs or representatives, was held to create no interest in the heirs or representatives of one who died before the testator, but that the legacy lapsed, those terms being construed words of limitation. *Appleton v. Rowley*, L. R. 8 Eq. 139.

bequest to the testator's daughter during life, and at her death to the heirs of her body, were held words of limitation merely, and to create an absolute title. But very similar words in another case¹⁶¹ are held to create only a life-estate in the first taker, with remainder to his children, as tenants in common. And there can be no question the latter case carries out the intention of the testator, while the other as clearly defeats it.

65. There is a late English case,¹⁶² where the general question of this section is examined by a very learned and able judge, — Lord Justice *Giffard*, then Vice-Chancellor. The rule in *Shelley's* case was here applied to the realty, on the ground of an intent to give the whole interest to the devisees and their heirs; but the learned judge dissented from the doctrine, that, where real and personal estate are blended in one bequest, the same estate must be created in both, and denied that the case of *Dunk v. Fenner*¹⁶³ is law.

66. The late case of *Morris v. Potter*¹⁶⁴ is well calculated to illustrate the subject of this section. The testatrix devised real estate to her executor and trustee, to apply the income for the equal benefit of her two grand-daughters, whose mother, the testatrix's daughter, had deceased. The will provided, that, in the event of the decease of either of the grand-daughters without issue, the whole income should be applied for the benefit of the survivor, and, upon the decease of both in like manner, the estate so bequeathed should go to the heirs at law of the testatrix. One of the grand-daughters deceased, without issue, in the lifetime of the testatrix, and the other subsequently, leaving one son. It was held that the grand-daughter, who survived the testatrix, took an equitable estate of inheritance which vested absolutely in her son at her decease, the want of words of inheritance being controlled by the evident intent of the will.

¹⁶¹ *Swain v. Rascoe*, 3 Ired. 200; s. p. *Coape v. Arnold*, 31 Eng. L. & Eq. 133; s. p. *Chelton v. Henderson*, 9 Gill, 432. But in Tennessee the rule in *Shelley's* case was maintained. *Polk v. Faris*, 9 Yerg. 209. In South Carolina, a devise to one for life, remainder to another, creates a fee in the remainder, without words of inheritance. *Waring v. Middleton*, 3 Desaus. 249. And it was here held that charging the land with the support of testator's mother was strong proof of intention to give a fee. *Dunlap v. Crawford*; 2 McCord, Ch. 171.

¹⁶² *Herrick v. Franklin*, Law Rep. 6 Eq. 593. See also *Holloway v. Holloway*, Law Rep. 6 Eq. 523.

¹⁶³ 2 Russ. & My. 557.

¹⁶⁴ 10 R. I. 58.

67. In a recent case¹⁶⁵ the distinction already adverted to¹⁶⁶ is maintained, that where the devise is, in express terms, for the life of the devisee, the addition of words of disposition creates merely a power, and no title in fee passes; but, where the devise is general, the superadded words of disposition create a fee in the devisee, and subsequent provisions in regard to others taking what remains at the decease of the first devisee will have no effect, being repugnant to the devise, while in the former case they will become operative.

* SECTION VI.

* 351

ELECTION AND SATISFACTION.

1. This implies that a devisee or legatee must elect to claim under the will or against it.
2. The case is well illustrated by the claim of dower by the widow.
3. There must be a clear repugnance between the will and her claim of dower, in order to put her to an election.
4. Where a devisee elects against the will, his devise will go to compensate the devisee thus defeated.
5. Election in favor of the will does not preclude one from taking, through another, against the will.
6. One may accept one provision of a will, and reject another wholly distinct; sed quære.
7. It is not important to the question of election, whether the testator knew his rights.
8. The doctrine of election is based upon compensation, and not forfeiture.
9. But power in the testator to make the disposition is indispensable.
10. This point illustrated by appointments made by married women.
11. Persons under disabilities not altogether disqualified from making election.
12. The heir not bound to elect by an imperfectly executed will.
13. To create a case of election, it must result from the disposition in testator's own right; and it does not apply to a wrong disposition under a power.
14. The doctrine of election does not apply to the case of creditors.
15. Parol evidence not admissible to show intent of testator, but is in aid of construction.
16. The will not construed to embrace other than testator's own estate, unless very clear.
17. General devise not construed to embrace estate held in autre droit, if any other exists.

¹⁶⁵ Downey v. Borden, 36 N. J. L. 460; McKenzie's Appeal from Probate, 41 Conn. 607.

¹⁶⁶ Ante, Part I. § 32, pl. 7, pp. 446-448.

18. The same general presumption prevails where testator has only a reversion or equity.
19. Provision in lieu of dower is a purchase of that estate, but not so as to share of personalty.
20. But the provision may be so expressed as to exclude the widow from any share.
21. Election must be made with full knowledge, or not binding.
22. In New York the claim of dower is sustained, unless clearly excluded.
23. The widow here may hold under the will and claim dower, unless clearly repugnant.
24. But if the widow accept of provision clearly in lieu of dower, it creates a bar.
25. Provision in lieu of dower must be paid in full, with interest.
26. The general devise of an estate carries an implied exception of dower.
27. Renunciation under the will only extends to the particular benefit.
28. The rules of law applicable to the subject stated by *Morton, J.*
29. The acceptance of the provisions of the will presumed because more beneficial.
- * 352 * 30. The widow may claim her share in undisposed-of personalty, while excluded from dower.
31. The bequest of one-half the estate means of the net amount.
32. Rules established in Virginia upon this subject.
33. The widow's right of election is personal, and not transmissible by descent.
34. Late American cases illustrating the time when one may be put to his election.
35. In most of the states, provisions of a statutory nature exist.
36. The doctrine of election as held in Pennsylvania.
37. Election and release may be presumed from lapse of time and other circumstances.
38. The heir at law bound to elect between the will and all other claims on his part, if such the intent.
39. The wife's acceptance of provision under will bars all claim to property bequeathed to others.
40. The widow suing for dower an election against the will. What amounts to an election under the will.
41. Illustration of the general principles of the topics discussed in this section.
42. Copartitioners not precluded from asserting claim for dower in each other's portions; but equity will compel compensation.
43. The same person cannot claim under two instruments intended to operate in substitution for each other or as alternatives.
44. How an estate is to be estimated with reference to the widow's share. What provisions of the will remain in force as to her after-renunciation.
45. The rule as held in Ohio.

§ 21. 1. THE definition of what is meant by election under a will may be thus stated,—that every person whom the instrument proposes, in any particular, to benefit, must elect whether he will claim under the will or against its provisions. This implies, of course, that the person thus put to an election has some rights in regard to the same subject, which he could maintain, independent of the will. The points are well illustrated by the case of the

testator's widow, who is by statute, in most of the American states, entitled to a certain share of the personalty, by waiving the provisions of the will; and is at common law entitled to dower in her husband's lands, unless she waive the same. If then there is a share of the personal estate given her by will, or a bequest is made expressly or by clear implication in lieu of dower, she must elect whether she will take under the will or not; and if she elect to take under the will she cannot also claim dower, or any portion of the personalty.¹

* 2. But what will put the widow to an election in regard * 353 to her dower is a point upon which there has been a good deal of discussion in the English courts; and as it is one which is very likely to occur in practice, and will well illustrate the general subject, it may not be amiss to state the points which have been decided in regard to it.

3. It must be reasonably clear that the provisions of the will were intended to be in lieu of dower. Thus it has been held, that a legacy in the will affords no ground of presumption that it was intended to exclude the right of dower. There is no repugnancy between such a gift and the claim of dower by her.² The right to

¹ *Arnold v. Kempstead*, Amb. 466; s. c. 2 Eden, 236; *Villareal v. Galway*, Amb. 682; *Pearson v. Pearson*, 1 Br. C. C. 292 and notes; *Fuller v. Yates*, 8 Paige, 325. But the widow is not barred of dower by an election to take under the will, if made under mistake, and she finally fails to obtain the benefits of the provisions of the will in her behalf. *Collins v. Melton*, 40 Miss. 242. There must be an alternative distinctly presented to put one to an election. *Cooper v. Cooper*, 18 W. R. 660.

² 2 Story, Eq. Jur. § 1088; *French v. Davies*, 2 Ves. Jr. 572, 577; *Lawrence v. Lawrence*, 2 Vern. 365; *Greator v. Cary*, 6 Vesey, 615; *Kitson v. Kitson*, Prec. in Ch. 351; *Foster v. Cook*, 3 Br. Ch. C. 347; *Fuller v. Yates*, 8 Paige, 325. But although the will is silent in regard to its provisions being intended to be in lieu of dower, yet if the widow, after the decease of the testator, agree with the heir to accept certain things in lieu of the devise, and in bar of dower, it will operate as an effectual bar of her claim. *Shotwell v. Sedam*, 3 Ham. 5; s. p. *Cauffman v. Cauffman*, 17 S. & R. 16; *Allen v. Pray*, 3 Fairf. 138. The acceptance of a conveyance of land construed an election to accept it in lieu of the price for which it was directed to be sold. *Beal v. Stehley*, 21 Penn. St. 376. Where an election exists in the widow, which she fails to make before her decease, each of her next of kin have the right of election as to his or her share, and neither the election of the majority or of the one entitled to administer will bind the others. *Fytche v. Fytche*, L. R. 7 Eq. 494.

dower being a clear legal right, it has been considered that the will itself ought to contain some provision inconsistent with such claim or right.³ In *Fuller v. Yates*⁴ the rule is thus stated: "The right of dower being a legal right, the wife cannot be deprived of it by a testamentary disposition in her favor, so as to put her to an election, unless the testator has manifested his intention to deprive her of her dower, either by express words or necessary implication." The gift of an annuity to the widow, although charged upon all the testator's property, and all the real estate is given to another person, will not be sufficient to put her to her election between the annuity and the claim of dower.⁵ And it was

* 354 here held * that even the gift of a portion of the real estate to the widow for life will not be sufficient to put her to an election. In the late case of *Bending v. Bending*,⁶ this point is examined at great length, and the conclusion reached, that the law of the Court of Chancery at the present day is that laid down by Lord *Redesdale*,⁷ that if you find any thing in the will which is inconsistent with the assertion, on the widow's part, of her right to have one-third of the land set out by metes and bounds, that raises a case of election. The rule laid down by Lord *Thurlow*, in *Foster v. Cook*,⁸ is that where the testator says, "I give all *my* estate:" he does not mean to give his wife's estate, which her right of dower is. And Lord *Alvanley*, in *Strahan v. Sutton*,⁹ intimates an opinion that there must appear from the will a clear purpose not to give the devise in addition to the dower, in order to put the wife to her election. And Lord *St. Leonards*, when Chancellor of Ireland, in *Hall v. Hill*,¹⁰ held that, to put the wife to her election, there must be a clear repugnance between the devise to the wife and her right to have dower set out by metes and bounds. And

³ *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, 452, 453; *Harrison v. Harrison*, 1 Keen, 765, where the question is discussed at length by Lord *Langdale*.

⁴ 8 Paige, 325, 328, 329.

⁵ *Holdich v. Holdich*, 2 Y. & Coll. C. C. 18, 21, 22. But where a provision is made for the widow through trustees, who are expressly directed to sell all the real estate of the testator, this will be regarded as sufficiently inconsistent with the claim of dower to put the widow to her election. *Vernon v. Vernon*, 53 N. Y. 351; s. p. *Lacey v. Hill*, 23 W. R. 285; *Rowland v. Cuthbertson*, L. R. 8 Eq. 466.

⁶ 3 Kay & Johns. 257.

⁷ *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, 449.

⁸ 3 Br. C. C. 347.

⁹ 3 Vesey, 249.

¹⁰ 1 Dru. & War. 94, 107.

this may now be regarded as the settled rule of the English equity law upon the subject.¹¹

* 4. And the same rule applies where the testator assumes * 355 to dispose of any other estate, or interest, which of right belongs to any devisee or legatee under the will. Such devisee or legatee must elect either to take under the will or against it. And if he elects against the will, his provision in the will will often go in equity to compensate the party disappointed of his bequest by such election; as where the testator had two acres, one in fee-simple and one in fee-tail, and devised the fee-simple to him who

¹¹ *Ellis v. Lewis*, 3 Hare, 310; Opinion of *Wigram*, V. C., id. 313, 315; *Chalmers v. Storil*, 2 V. & B. 222; *Dickson v. Robinson*, Jac. 503; *Roberts v. Smith*, 1 S. & Stu. 513; *Gibson v. Gibson*, 1 Drew. 42. The question of what will be sufficient to put the dowress to her election is discussed in numerous other cases; but the decisions all tend to confirm the doctrines which are stated in the text. *Thompson v. Nelson*, 1 Cox, 447; *Dowson v. Bell*, 1 Keen, 761; *Miall v. Brain*, 4 Madd. 119; *Butcher v. Kemp*, 5 Madd. 61; *Roadley v. Dixon*, 3 Russ. 192; *O'Hara v. Chaine*, 1 J. & La T. 662; *Grayson v. Deakin*, 3 DeG. & Sm. 298. The power of leasing, in the trustees, has been held to be inconsistent with a claim on the part of the widow to have the dower set out by metes and bounds. *Parker v. Sowerby*, 1 Drew. 488; s. c. 4 DeG., M. & G. 321, overruling *Warbuton v. Warbuton*, 2 Sm. & Gif. 163; *Reynard v. Spence*, 4 Beav. 103; *Taylor v. Taylor*, 1 Y. & C. C. C. 727; *Pepper v. Dixon*, 17 Sim. 200. But a power of sale does not put the widow to an election, as the sale may be made subject to the right of dower. *Ellis v. Lewis*, 3 Hare, 310; *Gibson v. Gibson*, 1 Drew. 42. Any direction of the testator which will be sufficient to put the widow to her election, as to part of the estate, will be extended to the whole. *Miall v. Brain*, supra, and other cases cited above. It is a point considerably contested, whether a devise to the widow and others, equally to be divided, will exclude dower, and put the widow to her election. The better opinion seems to be that it will. *Chalmers v. Storil*, 2 V. & B. 222; *Dickson v. Robinson*, Jac. 503; *Roberts v. Smith*, supra; *Reynolds v. Torin*, 1 Russ. 129. There seems to have been some difference of opinion how far a rent-charge will put the widow to an election. Lord *Hardwicke* held, in the early case of *Pitts v. Snowden*, 1 Br. C. C. 292, n., that it did not have that effect. There were some later cases which held the contrary. *Arnold v. Kempstead*, Amb. 466; s. c. 2 Eden, 236; *Villareal v. Lord Galway*, Amb. 682; 1 Br. C. C. 292, n. But *Pearson v. Pearson*, 1 Br. C. C. 292, *Foster v. Cook*, 3 Br. C. C. 347, *French v. Davies*, 2 Ves. Jr. 572, and several recent cases, confirm the former view. *Miall v. Brain*, supra; *Holdich v. Holdich*, 2 Y. & C. C. C. 18; *Lowes v. Lowes*, 5 Hare, 501. It seems settled, therefore, that an annuity charged on real estate will not put the dowress to her election. The dower, when barred, enures for the benefit of the estate. 1 Jarman, 439.

was issue in tail, and the fee-tail to another son. The issue in tail elected to enter upon the estate in tail, and thus defeated the devisee of that acre, who applied to the Court of Chancery to give him the acre devised to his brother, on the ground that his father intended something for him; and it was so decreed.¹²

5. But the doctrine of election and satisfaction does not preclude a party from accepting, through another, property or estate which such person obtains in opposition to the will; ¹³ as where one claims curtesy in land which his wife held in opposition to a * 356 will * under which he obtained benefits,¹³ or where one derived an estate from his co-heiress, although compelled to renounce his own share to receive the provisions made for him in the will.¹⁴

6. Sir *William Grant*, M. R., defines election thus: "Where one legatee under a will insists upon something by which he would deprive another legatee under the same will of the benefit to which he would be entitled, if the first legatee permitted the whole will to operate."¹⁵ And it is here held that a legatee or devisee may elect to renounce one gift under the will, and retain another which is wholly distinct from it. But where an annuity is given to a person, and a leasehold house also, where the rent reserved was more than the value of the house, it was held that the legatee could not accept the annuity and reject the house, but must accept the benefit

¹² *Anon.*, *Gilbert's Cases in Eq.* 15; *Kitson v. Kitson*, *Prec. in Ch.* 351; *Jenkins v. Jenkins*, *Belt's Sup. to Vesey*, 250; *Cookes v. Hellier*, 1 *Vesey*, Sen. 234; *Chetwynd v. Fleetwood*, 1 *Br. P. C.* 300; *Bor v. Bor*, 3 *id.* 167; *Churchman v. Harvey*, *Amb.* 335; *Forrester v. Cotton*, 1 *Eden*, 532; *Hoare v. Barnes*, 3 *Br. C. C.* 316; *Blake v. Bunbury*, 4 *id.* 21; *s. c.* 1 *Ves. Jr.* 514; *Finch v. Finch*, 4 *Br. C. C.* 38; *Whistler v. Webster*, 2 *Ves. Jr.* 367; *Wilson v. Townshend*, *id.* 693; *Wilson v. Mount*, 3 *Vesey*, 191; *Earl of Darlington v. Pulteney*, *id.* 384; *Blount v. Bestland*, 5 *Vesey*, 515; *Rich v. Cockell*, 9 *Vesey*, 369; *Thellusson v. Woodford*, 13 *Vesey*, 209; *Lord Rendlesham v. Woodford*, 1 *Dow*, 249; *Welby v. Welby*, 2 *V. & B.* 187; *Green v. Green*, 2 *Mer.* 86; *Abdy v. Gordon*, 3 *Russ.* 278; *Holdich v. Holdich*, 2 *Y. & C. C. C.* 18; *Nottley v. Palmer*, 2 *Drew.* 93; *Schroder v. Schroder*, *Kay*, 578-586. See also *Codrington v. Lindsay*, *L. R.* 8 *Ch. App.* 578; *Thompson v. Burra*, *L. R.* 16 *Eq.* 592.

¹³ *Cavan v. Pulteney*, 2 *Ves. Jr.* 544; *s. c.* 3 *Vesey*, 384.

¹⁴ *Wilson v. Wilson*, 1 *DeG. & Sm.* 152.

¹⁵ *Andrew v. Trinity Hall*, 9 *Vesey*, 525, 533, 534; *Moffett v. Bates*, 3 *Sm. & Gif.* 468; *Warren v. Rudall*, 1 *Johns. & H.* 1. See also *Seton v. Smith*, 11 *Sim.* 59.

cum onere.¹⁶ It seems doubtful how far the different provisions of a will can be regarded as wholly distinct.¹⁶

7. And it seems that the rule applies to contingent as well as to * vested interests,¹⁷ and to reversionary and re- * 357 mote interests as well as those more immediate.¹⁸ And it makes no difference whether the interest or estate which has been disposed of under the will, and which was not in the power of the testator, was supposed by the testator to belong to him or not. The court will not speculate upon that point, as nothing can be more dangerous than for a court to speculate upon what the testator would or would not have done, if he had known, or had not known, a particular thing.¹⁹

¹⁶ *Talbot v. Radnor*, 3 My. & K. 252; post, pl. 27, and notes. But it has been held that it must clearly appear that a bequest was intended to be in the alternative, in order to put the legatee to an election. *Creswell v. Lawson*, 7 Gill & J. 227. And if it be doubtful whether a provision for the widow was intended to be in lieu of dower, her right will prevail. It should be free from reasonable doubt in order to bar her claim. But if the widow enter, and claim and occupy under the will, and then forfeit her claim under its provisions by marrying again, she cannot then claim dower in the same property. *Stark v. Hunton*, Saxton, 216. The ground of the doctrine of election is said by Lord *Rosslyn* to be, that no man puts himself in a capacity to take under an instrument, without performing the conditions of the instrument, and they may be express or implied. And this is cited with approbation by Lord *Redesdale*, in *Moore v. Butler*, 2 Sch. & Lef. 267. See also *McQueen v. McQueen*, 2 Jones, Eq. 16; *Flippin v. Banner*, id. 450. A provision in lieu of dower construed to mean in lieu of dower and homestead. *Meech v. Meech*, 37 Vt. 414. Where an instrument was clearly intended to be in substitution for another, the same party cannot claim under both. *Box v. Barrett*, Law Rep. 3 Eq. 244; *McCarogher v. Whieldon*, id. 236. In the late case of *Wolaston v. King*, L. R. 8 Eq. 165, s. c. 17 W. R. 641, the subject of election is considerably discussed by V. C. *James*. It is here declared that the rule as to election is to be applied, as between a gift under the will and a gift dehors the will and adverse to it, not as between one clause in the will and another clause in the same will; it may be added, unless the will refers the two clauses to the election of the party, or it is obvious such was the intention of the testator.

¹⁷ Lord *Loughborough*, Chancellor, in *Wilson v. Townshend*, 2 Ves. Jr. 693, 696, 697.

¹⁸ *Webb v. Shaftesbury*, 7 Vesey, 480; *Wilson v. Townshend*, 2 Ves. Jr. 693. This is doubted by Lord *Hardwicke*, in *Bor v. Bor*, 3 Br. P. C. Toml. 167, 178, n.; but it seems clearly established. *Graves v. Forman*, cited in 3 Vesey, 67. See also *Mahon v. Morgan*, 6 Ir. Jur. Ch. 173; 1 Jarm. 441.

¹⁹ Lord *Alvanley*, in *Whistler v. Webster*, 2 Ves. Jr. 367; *Thellusson v. Woodford*, 13 id. 209; *Welby v. Welby*, 2 V. & B. 187; post, pl. 21 and notes.

8. Some question has been made whether the principle governing the cases of election is that of forfeiture or compensation. The strong current of authority, and especially of the later cases, seems to be in favor of compensation.²⁰ It is now regarded as the settled rule of equity law, that the doctrine of election only extends to compensation to such party as otherwise would wholly fail of an intended benefit under the will.²¹ There are, however, some names of high authority which have been thought to favor the extension of the rule to an absolute forfeiture.²²

9. But it seems that personal competency in the testator to make the disposition is indispensable to create a case which will compel the beneficiaries under the will to make the election. Thus, an infant, having neither the capacity nor the power to act in regard to real estate under the former English statute, his
* 358 * attempted disposition of real estate to any party will not compel one receiving a benefit under the will from personalty to make an election to abandon such real estate against which he has a claim.²³

10. And the same rule applies in case of coverture. If, therefore, the wife, having a testamentary power, makes an appointment by will in favor of her husband, and by the same will professes to bequeath the personal estate, to which her power does not extend, to another, the husband may take the benefit appointed to him, and also defeat the intended bequest of the other property, by means of his marital rights.²⁴

11. It seems to be settled by the more recent decisions in the English courts,²⁵ that *femes covert*, and others under disabilities,

²⁰ 1 Jarman, 417; *Webster v. Milford*, 2 Eq. Cas. Ab. 362, pl. 11; *Lewis v. King*, 2 Br. C. C. 600; *Freke v. Lord Barrington*, 3 id. 274; *Blake v. Bunbury*, 1 Ves. Jr. 514; *Ward v. Baugh*, 4 id. 623; *Dashwood v. Peyton*, 18 Vesey, 27, 49; *Tibbits v. Tibbits*, Jac. 317.

²¹ 2 Story, Eq. Ju. § 1085, and cases cited.

²² Lord *Langdale*, M. R., in *Greenwood v. Penny*, 12 Beav. 403; Lord *Eldon*, Chancellor, in *Green v. Green*, 2 Mer. 86; s. c. 19 Vesey, 665. But this case turned upon the distinction between a deed and a will; and his lordship did recognize the doctrine of compensation in *Ker v. Wauchope*, 1 Bligh, 1. See also *Rancliffe v. Parkyns*, 6 Dow, 149. And the doctrine of compensation is recognized as the settled doctrine of the court in *Schroder v. Schroder*, Kay, 578.

²³ *Hearle v. Greenbank*, 1 Ves. Sen. 298.

²⁴ *Rich v. Cockell*, 9 Vesey, 369.

²⁵ *Barrow v. Barrow*, 4 Kay & J. 409.

may make an election under a will, which, after being acted upon by other parties, will be upheld by courts of equity. The question is discussed very much at length, and the cases extensively reviewed, by Sir *William Page Wood*, V. C., in the case last cited; and the conclusion to which this eminent judge came was, that a married woman can elect, so as to effect her interest in real estate, without deed acknowledged according to the requisite formalities of the statute; and that where she has, in fact, made such election, upon which other parties have acted, the court can order a conveyance accordingly, the ground of such order being that no married woman shall avail herself of benefits arising from a fraud. In discussing the subject, the learned judge relied upon *Savage v. Foster*,²⁶ and *Gretton v. Haward*,²⁷ as fully recognizing the rule upon which he acted; and he maintained that the views of Lord *Eldon*, in *Jackson v. Hobhouse*,²⁸ when properly considered, could not fairly be regarded as impugning the doctrine for which he contended. Notwithstanding the earlier cases have seemed to lean to some extent in the opposite direction,²⁹ the rule, as declared by Sir * *W. P. Wood*, is so just and reasonable, that we * 359 should feel surprised if it did not maintain its ground. The cases of *Lassence v. Tierney*,³⁰ and *Field v. Moore*,³¹ are here explained, and made consistent with the decision of the learned judge. But by the latest declaration of the House of Lords, in *Cooper v. Cooper*, (a) it was held that a married woman could not, in strictness, make an election; and that it must, therefore, be inquired how far the proposed election would be for her benefit. This may not be at variance with the rule stated by Vice-Chancellor *Wood* (Lord *Hatherly*), that where a married woman does, in fact, make an election which is acquiesced in and acted upon by others, she will be bound by it.

12. Where the law, as under the former English statute, requires

²⁶ 9 Mod. 35.

²⁷ 1 Swanst. 409.

²⁸ 2 Mer. 483.

²⁹ *Frank v. Frank*, 3 My. & Cr. 171; *Wall v. Wall*, 15 Sim. 513. The reasons of the doctrine are presented with great force in *Wilson v. Lord Townshend*, 2 Ves. Jr. 693, 696, 697. The ordinary mode of enforcing an election by married women in the Court of Chancery is by reference to the Master to determine whether it will be advantageous to her to do so. But in a clear case it will be decided without such reference. Lord *Loughborough*, Chancellor, in *Wilson v. Townshend*, supra.

³⁰ 1 Macnaghten & Gordon, 551.

³¹ 19 Beav. 176.

(a) L. R. 7 Ho. Lds. 53.

greater formalities in a will disposing of real than of personal estate, and the will is not executed with all requisite form to pass real estate, but is valid to pass personal estate, and gives a legacy to the heir, and also professes to dispose of some of the real estate away from the heir, it will not be sufficient to put him to his election,³² unless the legacy is given upon the express condition that he will confirm the disposition in regard to the realty.³³

13. It seems clear, that, to constitute a case of election, there must be an actual disposition of property belonging to the person who is to be put to his election. And the fact that the testator declares that he gives property to one, supposing that other property will go by descent to another, when in fact the property goes by descent to the very person to whom the bequest is made, unless the bequest is made conditional upon such descent as the testator expected, will not create a case of election.³⁴ There must be some of the testator's own property given to one whose property by the same will is given to another, so that, if the former legatee elects to hold his own property, that which was bequeathed to him may be taken to compensate the one to whom his property was intended to be given.³⁵ And the doctrine does not apply where the testator merely gives property under a power to persons not within the range of appointment, and at the same time gives the property, which he might have given to such persons, to others to whom the first power applied.³⁶

³² *Buckeridge v. Ingram*, 2 Ves. Jr. 652; *Kearney v. Macomb*, 1 C. E. Green, 189.

³³ *Boughton v. Boughton*, 2 Ves. Sen. 12. But see *Brodie v. Barry*, 2 V. & B. 127, where a will imperfectly executed as to some portion of the property was held to create a case of election. But see *Sheddon v. Goodrich*, 8 Vesey, 481, where the rule in the text is confirmed. See also *Allen v. Anderson* 5 Hare, 163, as to the operation of the will upon property in different countries, and its effect upon the duty of election.

³⁴ *Langslow v. Langslow*, 21 Beav. 552.

³⁵ 1 *Jarman*, 422.

³⁶ *Re Fowler's Trusts*, 27 Beav. 362. See *Churchill v. Churchill*, Law Rep. 5 Eq. 44; *Blaiklock v. Grindle*, Law Rep. 7 Eq. 215; *Grissell v. Swinhoe*, Law Rep. 7 Eq. 291. See *Cooper v. Cooper*, L. R. 6 Ch. App. 15, where *Grissell v. Swinhoe* is explained, and the rule declared, that where the testatrix, supposing she retained the power of appointment over an estate, directed by her will that such estate should go to her eldest son, and gave of her own property to her other sons, upon the supposition that they would receive none of the appointed property, but that it would all go to the elder brother under the appointment in the will, it proving that she had already made a final appoint-

* 14. The doctrine does not apply to creditors, who may * 360 hold all which is appropriated by the testator for the payment of debts; and in addition to this they may also insist upon their lien upon all other property which is liable for debts, notwithstanding its appropriation by the will to other purposes.³⁷

15. As an election depends upon the purpose of the testator, and whether he intended the devisee, upon accepting the provisions of the will, to acquiesce in all the other provisions of the instrument, it has often been made a question, how far parol evidence was admissible to show such intention. It is undeniable that parol evidence is receivable, to the same extent as in other cases, in aid of the construction of written instruments; i. e., to show the condition of the subject-matter and the surrounding circumstances, so far as to place the court in the position of the testator.³⁸ But the intent must appear by the words of the will, with the aid of allowable construction, or it cannot be regarded in determining the question of election.³⁹

16. And it seems to be entirely well settled, that, in order to put a party to an election, it must be entirely clear that the testator intended to include the property, upon which such party has a legal claim independent of the will, in the dispositions made by such instrument. If the provisions of the will can have any reasonable construction, without including property not exclusively the testator's, they will receive such construction; as where the testator devised all his funded property or estate to trustees, for his wife for life, and afterwards for the payment of legacies, it was held not to include stocks standing in the name of the testator and his wife, but that the wife would take those by survivorship.⁴⁰ But this

ment of the former estate among all her sons equally, it was held to create a case of election under the will. This case was affirmed in the House of Lords, 22 W. R. 713, L. R. 7 Ho. Lds. 53.

³⁷ *Kidney v. Coussmaker*, 12 Vesey, 136; *Clark v. Guise*, 2 Ves. Sen. 617; *Deg v. Deg*, 2 P. Wms. 412.

³⁸ *Lady Cavan v. Pulteney*, 2 Ves. Jr. 544; s. c. 3 Ves. 384. See here the distinction between a condition and such election as courts of equity compel.

³⁹ *Blake v. Bunbury*, 1 Ves. Jr. 514; *Stratton v. Best*, 1 Ves. Jr. 285; *Rutter v. Maclean*, 4 Ves. 531; *Pole v. Ld. Somers*, 6 Ves. 309; *Druce v. Denison*, id. 385; *Doe v. Chichester*, 4 Dow, 65, 76, 89, 90; *Clementson v. Gandy*, 1 Keen, 309; *Dixon v. Samson*, 2 Y. & Coll. Eq. R. 566.

⁴⁰ *Dummer v. Pitcher*, 2 My. & K. 262; s. c. 5 Sim. 35; *Crabb v. Crabb*, 1 My. & K. 511; *Blommart v. Player*, 2 Sim. & Stu. 597; *Parker v. Car-*

* 361 rule of construction has not always prevailed,⁴¹ and its * application must depend much upon the circumstances of each case.

17. And a general devise of the testator's real estate will only extend to such estate as he holds in his own right.⁴² But where the devise refers to a particular locality, and the testator has no estate in that locality which he holds exclusively in his own right, it may be construed as intended to apply to estates of which he was seised in the right of another.⁴³ And the same rule of construction will extend to the devise of an estate which the testator holds jointly or in common with another. His own interest will be supposed to have been intended, unless it is very clear he intended also to dispose of the whole property.⁴⁴ But where the testator uses the expression, "all that my messuage, tenement," &c., "at A.," it has been held to embrace the entire title, although the testator owned only the moiety.⁴⁵ But it seems to us, that, upon the most approved rules of construction, such general terms ought not to be construed as extending beyond the interest of the testator at the time the will becomes operative.

18. Where, therefore, the testator devises an estate in which he has only a reversionary interest, it will be regarded as *prima facie* his intention to have the will operate only upon the reversionary interest. But if he makes limitations and confers powers which could never become operative, or would have no rational meaning, except with reference to the creation of a present interest, the devise will be construed as intended to embrace the entire estate.⁴⁶ And a similar question may arise where the testator is owner of the estate subject to incumbrances.⁴⁶

19. It seems that where a provision is made for the widow, in lieu of dower and thirds, or of all other claim upon the estate, that this will only extend to put her to her election as to that

ter, 4 Hare, 400; *Smith v. Lyne*, 2 Y. & C. C. C. 345; *Seaman v. Woods*, 24 Beav. 372, 381.

⁴¹ *Shuttleworth v. Greaves*, 4 My. & Cr. 35.

⁴² 1 Jarman, 426; *Timewell v. Perkins*, 2 Atk. 102.

⁴³ *Read v. Crop*, 1 Br. C. C. 492; s. c. Cox, Ms. 1 Swanst. 402 and note.

⁴⁴ *Padbury v. Clark*, 2 Mac. & Gor. 298; *Fitzsimons v. Fitzsimons*, 6 Jur. N. s. 641. See also *Swan v. Holmes*, 19 Beav. 471.

⁴⁵ *Welby v. Welby*, 2 V. & B. 187; *Wintour v. Clifton*, 21 Beav. 447; *Usticke v. Peters*, 4 Kay & J. 437.

⁴⁶ *Stephens v. Stephens*, 3 Drew. 697; s. c. 1 DeG. & J. 62.

portion of the estate which is *effectually* disposed of by the will. If, therefore, the disposition of the personal estate becomes inoperative in consequence of the incapacity of the legatee to take, or for * any other cause, the widow will not be precluded * 362 from claiming her share under the statute of distributions.⁴⁷

But as to the dower, the rule is different. Where the testator gives the widow an equivalent in lieu of dower, he is regarded as having purchased that right for the benefit of the estate; and her right will not revive upon any failure of the testator to make an effective disposition of it.⁴⁸

20. But where the will contains a provision for the widow, in lieu of all other claim upon the estate, it will exclude all claim on her part to any share in any undisposed-of portion of the estate which results from the deficiency of the will, and not from the failure of any attempted disposition of the estate to take effect in the manner contemplated by the testator.⁴⁹ The distinction between this and the last rule stated seems to be founded upon the ground, that the exclusion of the widow, in the former case, is conditioned upon the provisions of the will becoming effective; and in the other, that they are made absolute and independent of all condition.

21. It is proper to remember, that, in order to bind any person by an election, it is requisite to show that it was made with full knowledge of all the facts, including the rights of the person in question. And if made under any mistake, misapprehension, or ignorance, it will not be valid.⁵⁰ So, where there is any defect of capacity or comprehension, the election will not be binding. (a) And any person having made an election without such full knowledge and understanding will be entitled to elect again.⁵¹

⁴⁷ *Pickering v. Lord Stamford*, 2 Ves. Jr. 272, 581; s. c. 3 Ves. 332, 492. But a declaration to this effect in a *settlement* will effectually bar the widow. *Gurly v. Gurly*, 8 Cl. & Fin. 743; *Druce v. Denison*, 6 Ves. 385; *Norcott v. Gordon*, 14 Sim. 258.

⁴⁸ 1 Jarman, 440.

⁴⁹ *Lett v. Randall*, 3 Sm. & Gif. 83.

⁵⁰ *Wake v. Wake*, 1 Ves. Jr. 335; *Reynard v. Spence*, 4 Beav. 103; *Edwards v. Morgan*, 13 Price, 782; s. c. M'Clel. 541; s. c. 1 Bli. n. s. 401; *Brice v. Brice*, 2 Moll. 21; *Wintour v. Clifton*, 21 Beav. 447; *Kidney v. Coussmaker*, 12 Ves. 136.

(a) *Brown v. Brown*, 108 Mass. 386.

⁵¹ *Padbury v. Clark*, 2 Mac. & Gor. 298, 306; *Brice v. Brice*, 2 Moll. 21. See also, upon the general question as to what constitutes a valid election,

22. The cases in the American courts, where the doctrine of * election came in question, are very numerous, and a majority of them have reference to dower. Thus in New York it is held that the claim of dower is to be favored, and that the presumption is that any provision in the will is matter of bounty, and was not intended to be in lieu of dower, unless so expressed, or there is some clear implication to that effect.⁵² And although there be a devise to the widow of greater value than her dower, it carries no presumption that it is intended in lieu of dower.⁵³

23. It has been held in this state that a legacy,⁵⁴ or a charge for support,⁵⁵ or any provision for the wife in the will, that is not absolutely inconsistent with the claim of dower, will not make a case calling upon the widow for an election.⁵⁶ In this last case it was held, that a devise of the whole estate to the widow for life, with remainder to others, was not a provision in lieu of dower, but that the widow might take one-third of the estate as dowress, and the remainder as devisee. And the claim of dower is not barred in such case by the foreclosure of a mortgage executed by the husband alone during coverture, and a sale under the decree, notwithstanding the widow was made a party to the bill, and it was alleged she claimed some interest in the premises.

24. But if the widow accept of any thing whatever in lieu of dower, she is thereby barred, and this may be pleaded either at

Worthington v. Wiginton, 20 Beav. 67; *Dillon v. Parker*, 1 Swanst. 359, 382; *Ruttledge v. Ruttledge*, 1 Dow. & Cl. 331; *Harris v. Watkins*, 2 Kay & J. 473. Courts of equity sometimes grant relief in such cases where the parties have acted inadvertently, and under what the law deems surprise. *Pusey v. Desbouvrie*, 3 P. Wms. 315. And where the widow, as general devisee under her husband's will, had conveyed a large part of the land in trust for the payment of her own debts, and afterwards dissented from the will under the statute, she was held entitled to dower. *Ramsour v. Ramsour*, 63 N. C. 231. But, in general, the widow who is entitled to dower can exercise no rights over the land until her dower is assigned. *Webb v. Boyle*, 63 N. C. 271.

⁵² *Lasher v. Lasher*, 13 Barb. 106; *Leonard v. Steele*, 4 id. 20.

⁵³ *Havens v. Havens*, 1 Sandf. Ch. 324; *Mills v. Mills*, 28 Barb. 454.

⁵⁴ *Adsit v. Adsit*, 2 Johns. Ch. 448.

⁵⁵ *Smith v. Kniskern*, 4 Johns. Ch. 9.

⁵⁶ *Lewis v. Smith*, 5 Seld. 502; s. p. 4 Kent, Comm. 58; *Adsit v. Adsit*, 2 Johns. Ch. 448; *Wood v. Wood*, 5 Paige, 596; *Fuller v. Yates*, 8 Paige, 325; *Sanford v. Jackson*, 10 id. 266; *Bull v. Church*, 5 Hill, 206; *Mills v. Mills*, 28 Barb. 454.

law or in equity.⁵⁷ But to have this effect, it must appear to have been the manifest intention of the testator that it should be received in lieu of dower.⁵⁸

25. The widow's relinquishment of dower is viewed as a valuable acquisition to the estate; and therefore the equivalent must be paid in full, even where other legacies have to abate.⁵⁹

* And in such a case the widow is entitled to interest upon * 364 a legacy given in lieu of dower from the death of the testator, it being regarded as an alimentary stipend.⁶⁰ But a bequest will not operate to bar dower until accepted.⁶¹ The fact that provision in lieu of dower has not been fully paid will not defeat its effect as a bar of dower, if it has been accepted as such.⁶² Part payment of a legacy in lieu of dower, and the recovery of a judgment for the balance, will be an effectual bar.⁶³ The widow is barred from the time of her election, as well at law as in equity.⁶⁴

26. This question is carefully examined by *Denio*, Ch. J., in a late case in the New York Court of Appeals,⁶⁵ and the following rules laid down. In order to raise a case for election under a will, a clear and decisive intention of the testator must be manifested by the will itself, to dispose of that which did not belong to him, and which might be claimed by a legatee. If his expressions will admit of being restricted to some interest in property belonging to or disposable by the testator, they will not be held to apply to that over which he had no disposing power. Hence, where the husband makes a general devise of dowerable estate, it is not considered that he intended the devisee to have it exempt from the claim of dower, but the contrary; since the title to dower is a right paramount to that of the testator, and, in such general devise, an exception of such right is implied.⁶⁶

⁵⁷ *Larrabee v. Van Alstyne*, 1 Johns. 307; *Jones v. Powell*, 6 Johns. Ch. 194. See also *Adams v. Adams*, 39 Ala. 274.

⁵⁸ *Jackson v. Churchill*, 7 Cowen, 287.

⁵⁹ *Isenhardt v. Brown*, 1 Edw. 411. The same rule obtains in Massachusetts. *Pollard v. Pollard*, 1 Allen, 490; *Hubbard v. Hubbard*, 6 Met. 50.

⁶⁰ *Pollard v. Pollard*, 1 Allen, 490; *Williamson v. Williamson*, 6 Paige, 298, 305. See post, § 31, as to time legacies are to be paid, n. 13.

⁶¹ *Larrabee v. Van Alstyne*, 1 Johns. 307. ⁶² *Kennedy v. Mills*, 13 Wend. 553.

⁶³ *Van Orden v. Van Orden*, 10 Johns. 30.

⁶⁴ *Van Orden v. Van Orden*, 10 Johns. 30; *Kennedy v. Mills*, 13 Wend. 553.

⁶⁵ *Havens v. Sackett*, 15 N. Y. 365.

⁶⁶ *Adsit v. Adsit*, 2 Johns. Ch. 448; *Church v. Bull*, 2 Denio, 430. And

* 365 * 27. The general principle of requiring a devisee or legatee to renounce every claim under the will, where he elects to hold against its provisions, must receive this qualification, as has often been held both in this country and in England, that such renunciation does not extend beyond the particular portion of the will with which the claim against the will is connected. If, therefore, the same person has a provision under the will which is wholly independent of and disconnected with that which he elects to renounce, he may receive the benefit of it at the same time that he renounces one which is inconsistent with his legal rights, which he is not prepared to relinquish; as where a devise is made upon the condition of paying \$300 to other persons, and the same devisee is made residuary legatee, he may renounce such conditional devise without refusing the benefit of the residuary bequest.⁶⁷

28. The doctrine of election under wills is discussed considerably by *Morton, J.*, in the case of *Reed v. Dickerman*,⁶⁸ and the rule in regard to gifts in lieu of dower declared to be, that, to put the dowress to her election, it must either appear that the provision in the will for her benefit is made upon the express condition that it shall be in lieu of or in satisfaction of dower, or else it must clearly appear from the will that it was the intention of the testator that the widow should not have both the donation and the dower. The

where the widow's taking both the provisions of the will and her dower will materially derange the provisions made for others, and it does appear by the will that such was not the intention of the testator, she must make her election. *Dodge v. Dodge*, 31 Barb. 413. And where the wife's separate property, with other, is bequeathed by her husband to her, with remainder over, she must elect. *Reaves v. Garrett*, 34 Ala. 558. She is not obliged to elect until the value of the estate bequeathed to her is known; and almost any act of hers before that is known will not be construed to operate as a binding election upon her. *Ib.* See also *Pemberton v. Pemberton*, 29 Mo. 408; *Wood v. Wood*, 1 Met. (Ky.) 512.

⁶⁷ *Ward v. Ward*, 15 Pick. 511; *Wilde, J.*, in *Hapgood v. Houghton*, 22 Pick. 480, 483, where the rule is thus expressed: "Where a man by his will gives a child or other person a legacy or portion in lieu and satisfaction of a particular thing, this shall not exclude him from another benefit, though it may happen to be contrary to the will; for the court will not construe it in lieu of every thing else, when he has named a particular thing." See also *Hyde v. Baldwin*, 17 Pick. 303; *East v. Cook*, 2 Vesey, Sen. 30. See *Wilkinson v. Dent*, L. R. 6 Ch. App. 339; *Orrell v. Orrell*, *id.* 302.

⁶⁸ 12 Pick. 146, 149. The same rule, as to the time within which the widow must make her election, was further illustrated in the case of *Delay v. Vinal*, 1 Met. 57.

presumption of the English law is, that it was intended as a gratuity, and not in satisfaction of the right of dower. But this presumption is reversed by the Massachusetts statute; and such provision in the will for the widow will be deemed to be in lieu of dower, unless it plainly appear that the testator intended it to be in addition to it. And the widow is presumed to accept of such provision under the will, unless she does some positive act, within a reasonable time, to show her election to have dower. And what is a reasonable time depends upon the facts of the * par- * 366 ticular case. But where the widow had acquiesced in the provisions of the will, occupying the real and disposing of the personal estate bestowed upon her by that instrument, it was held she was bound by such acquiescence, as an irrevocable election to accept the provisions of the will.⁶⁸

29. And where a provision is made in the will of the husband, for his wife, in express terms, in satisfaction of all claim of dower on her part, upon the condition that she should educate and bring up the testator's grand-daughter, the widow, only surviving the testator seven days, was held presumptively to have accepted the provisions of the will, upon the ground that it was more beneficial to her; and the condition for the support and education of the grand-daughter, being subsequent, will not divest her estate under the will, its performance being defeated by the act of God.⁶⁹

30. The widow is not excluded from claiming her share in the undisposed-of personalty, under the statute of distributions, by reason of any provision in the will for her benefit, unless it be

⁶⁸ *Merrill v. Emery*, 10 Pick. 507, 510. This case has been sometimes quoted as carrying the doctrine of presumptions to the extreme verge; but it seems to us entirely sustainable, upon the ground that no other rule could have been applied with reasonable propriety to the particular facts of the case; and the case must have been decided upon those facts alone, since there were no other. But we are not to infer from this decision that in every case the presumption of an election to hold under the will could be justified in the short period of seven days, where the provision was beneficial to the dowress, and she did not dissent from it. This case stands upon its peculiar facts, and is not much authority for any other not precisely similar. The American cases upon this subject are very numerous, and could not be here discussed. See *Smith v. Guild*, 34 Me. 443; *Weeks v. Patten*, 18 id. 42; *Buist v. Dawes*, 3 Rich. Eq. 281; *Waters v. Howard*, 1 Md. Ch. Dec. 112; *Lewis v. Lewis*, 33 Penn. St. 66; *Fulton v. Moore*, 25 Penn. St. 468; *Hamblett v. Hamblett*, 6 N. H. 333; *George v. Bussing*, 15 B. Mon. 558.

clearly expressed to be in satisfaction of all her claim upon the estate, or such appear from the will itself, with such aids to its construction as are allowable, to have been the intention of the testator. And the fact that she is excluded by the will from all claim of dower will not affect her claim to the personal estate.⁷⁰

* 367 * 31. Upon a bequest of "one-half my property," the estate consisting of mere personalty, the legatee takes one-half the net amount, after payment of debts, and expense of administration.⁷¹

32. The widow must make an election, whenever her taking dower would clearly interfere with provisions in her favor contained in the will. And her repeated declarations that she accepts and holds property bequeathed to her by her husband's will in full satisfaction of her interest in the estate, made with full knowledge of all the facts, and her refusal to receive more, amount to sufficient election.⁷² But if she take a legacy provided by the will to enable her to carry out the provisions of the will, and has all along been under misapprehension as to her rights, she will not be held to have made a conclusive election, even after the lapse of five years, but may still claim her dower.⁷³

33. The widow's right of election under the will of her husband is a personal right, and is not transmissible by descent.⁷⁴

⁷⁰ *Ex parte Kempton*, 23 Pick. 163. In this case, where the statute (Rev. Stat. c. 60, § 11) enacted, that, if any provision be made for a widow in the will of her husband, she shall make her election, whether to accept such provision or be endowed of his land, the provision was held not to affect her claim to the personalty undisposed of by the will. *s. p. Vedder v. Saxton*, 46 Barb. 188; *Deltzer v. Scheuster*, 37 Ill. 301.

⁷¹ *Briggs v. Hosford*, 22 Pick. 288; *Nickerson v. Bowly*, 8 Met. 424. Where the testator provided in his will that his widow should have and hold as her own property all the property of every kind that she had at her marriage, it was construed to mean only such as remained in specie, and had no claim for such as had been used up. *Brown v. Brown*, 41 N. Y. 507.

⁷² *Dixon v. McCue*, 14 Gratt. 540; *Craig v. Walthall*, id. 518.

⁷³ *Dixon v. McCue*, 14 Gratt. 540. The presumption in Alabama seems to be, that a provision for the widow shall be considered in lieu of dower, unless it clearly appears from the will to have been intended as an addition to her right of dower.

⁷⁴ *Welch v. Anderson*, 28 Mo. 293. But where the widow made her dissent in writing from the provisions of her husband's will and renunciation of the same, and gave it to another with instructions to file in the probate-office,

34. It seems to be the settled doctrine of courts of equity everywhere, not to require a party to choose between opposing interests until they are in such a state as to enable him to see on which side his interest lies.⁷⁵ The devise of "all my real and personal estate, . . . to be divided among my wife and children, share and share alike," does not require the wife to waive her dower, * as the words used refer only to the husband's interest.⁷⁶ * 368 And an election in any case is not binding, unless made with full knowledge.⁷⁷

35. Many of the states contain provisions for the widow making her election whether to accept or renounce the provisions made for her in her husband's will within a limited time, and, upon failure to do so, providing that she shall only be entitled to such provision as such will makes for her. But in such cases it has been considered that such statutory provision does not apply to a case where no provision is made in the will⁷⁸ for the widow. There could, of course, be no occasion to renounce the provision of the will in such a case.

36. It was held in Pennsylvania,⁷⁹ that where the widow devised her late husband's estate, one-half to his brothers and sisters, and the children of such as had deceased, and the other half to her own brothers and sisters, and the children of such as had deceased, she having in fact no power to dispose of the estate, the very persons to whom she had devised one-half of it being entitled

but died before it was so filed, it was held operative if filed by the person to whom intrusted within the time limited by statute. *McGrath v. McGrath*, 38 Ala. 246. In Tennessee the widow, not renouncing the provisions of the will of her husband, is presumed to assent to them, and is bound by them and barred of dower in lands not disposed of by the will, the provisions therein being in lieu of all dower. *McClung v. Sneed*, 3 Head, 218. The subject is further discussed in *Gupton v. Gupton*, 3 Head, 488. If a widow accept the office of executor of her husband's will, she cannot afterwards renounce its provisions, and claim dower in opposition thereto. *Mendenhall v. Mendenhall*, 8 Jones, Law, 287.

⁷⁵ *Dunlap v. Ingram*, 4 Jones, Eq. 178. But courts of equity will put parties to an election under wills where the facts justify it. *Huston v. Cone*, 24 Ohio, n. s. 11.

⁷⁶ *Carroll v. Carroll*, 20 Texas, 731.

⁷⁷ *Wells v. Robinson*, 13 Cal. 133. See also *Kyle v. Taylor*, 2 Met. (Ky.) 47; *Huston v. Cone*, 24 Ohio, n. s. 11.

⁷⁸ *Roberts v. Roberts*, 34 Miss. 322.

⁷⁹ *Gable's Ex'rs v. Daub*, 40 Penn. St. 217.

to hold the whole by inheritance from her husband, that, if they should elect to take under the will, such election would confirm the devise of the other half of the estate, and also the title of a purchaser under the widow, she having devised the purchase-money in the same manner above stated. And where the testator had given his wife, by will, real and personal estate "in lieu of her dower, or one-half" of his estate, she is not entitled to a share in the residue, which he directed to be divided "among the whole of his heirs already named" in the will, "proportioned to the amounts given to each in the body" of the will.⁸⁰

37. The making of an election and the execution of a release in conformity therewith may be presumed, in order to quiet possession and perfect title after great lapse of time.⁸¹

38. The heir at law must elect between the provisions of the will and her right both as heir and under the marriage settlement * 369 * of her father the testator, where such appears to have been the purpose and scope of the will.⁸²

39. Where the testator devised land, the title of which stood in his name and that of his wife, and the absolute title to which would vest in the wife on his decease, she surviving, and also made provision in his will for his wife, it was held that if she accepted such provision it was an election and satisfaction of her claim to the lands so devised.⁸³

40. It was held at an early day, that, if the widow sued for her dower, this was an election against the provisions of the will in lieu of dower.⁸⁴ And where the widow had received a deed of house and land from her husband, and by will he devised the same property to her for life, with remainder to her issue, and after his death she entered into possession of the same and de-

⁸⁰ *McKeen's Appeal*, 42 Penn. St. 479.

⁸¹ *Tiernan v. Roland*, 15 Penn. St. 429.

⁸² *Macnamara v. Jones*, 1 Br. C. C. 481; *Lewis v. King*, 2 id. 600. But an election under the will cannot affect the title of the heir to after-acquired lands which cannot pass under the will. *Back v. Kett*, 1 Jac. 534. But where the will purports to convey such lands, the election to hold under the will renounces all claim to them. *Churchman v. Ireland*, 1 Russ. & My. 250. But *Hall v. Hall*, 2 McCord, Eq. 269, seems to favor the rule as first stated.

⁸³ *Coates v. Stevens*, 1 Yo. & C. Exch. 66. But see *Coleman v. Jones*, 3 Russ. 312.

⁸⁴ *Gosling v. Warburton*, Cro. Eliz. 128. But not so in Kentucky. *Shaw v. Shaw*, 2 Dana, 341.

fended an ejectment as devisee, receiving the rents during life, it was held to be an election by her which bound her representatives.⁸⁵

41. In a recent case in California,⁸⁶ the general subject of this section is considerably discussed, and its leading principles maintained. 1. That if by the general scope of the will it appeared that the husband intended to dispose of all the property under his control, half of which by the law of that state belonged to his wife, and the assertion by her of her community of interest in the same must defeat the objects of the will, her acceptance of the provisions of the will was a relinquishment of any such claim. 2. That if it appeared the testator did not intend to dispose of her interest, then her acceptance will have no such effect. 3. Although the * testator has no legal power to dispose of the property * 370 of another, yet if he assumes to do so by his will, and such person accepts a devise or bequest under the will, it will be a confirmation of such disposition of his own property by the testator.

42. Where, in the partition of real estate between co-devisees, one of them had an inchoate right of dower in a portion of the estate set to another, which afterwards became perfected by the death of her husband, it was held she was not precluded from asserting the claim, but that equity in allowing the claim will also compel the partitioners to compensate the loss to the one from whom dower is taken.⁸⁷

43. The heir cannot claim real estate embraced in a settlement imperfectly executed, and at the same time also claim personally under the provisions of the settlement.⁸⁸ One by claiming to hold under the provisions of an instrument imperfectly executed con-

⁸⁵ *Stratford v. Powell*, 1 Ball & B. 1. See also *Rumbold v. Rumbold*, 3 Vesey, 65; *Upshaw v. Upshaw*, 2 H. & M. 381; *Clay v. Hart*, 7 Dana, 1; *Watkins v. Watkins*, 7 Yerg. 283; *English v. English*, 2 Green, Ch. 504.

⁸⁶ *Morrison v. Bowman*, 29 Cal. 337.

⁸⁷ *Walker v. Hall*, 15 Ohio, n. s. 355. And where a provision in the will, for a home for the widow and minor children until they came of age, was defeated, as to the widow, by reason of her refusal to relinquish dower as required by the will, a court of equity will not allow the election of the widow against the provision to defeat the intended benefit to the children. *Roe v. Roe*, 21 N. J. Eq. 253.

⁸⁸ *Brown v. Brown*, Law Rep. 2 Eq. 481. See also *Griggs v. Gibson*, Law Rep. 1 Eq. 685.

firms the same, and renders it operative so far as his interests are concerned.⁸⁹

44. In computing the amount of an estate for the purpose of determining what the widow is entitled to receive, after having renounced the provisions of the will of her husband, promissory notes bequeathed to the makers are to be reckoned as part of the estate, and personal property is to be estimated at its value at the time of distribution. And if the will gives the widow the income of certain personal property while she remains unmarried for the support of herself and two minor children, by her waiving the provisions of the will the whole of such income will go for the benefit of the children. But a provision that the investment shall not be changed without the consent of the widow will remain in force after her renunciation.⁹⁰

45. In Ohio it was decided (1873) that where a will assumes to dispose of property to one of its beneficiaries, which belongs to another person for whom provision is made in the will, the latter must elect between the provision in the will and the property thus disposed of by the will. He cannot claim both.⁹¹

* SECTION VII.

LIMITATIONS TO "SURVIVORS."

1. The question how far "survivor" may be held equivalent to "other."
- 2, and n. 1. The rule now seems to be that the word shall have the same natural construction as any other word.
3. This view confirmed by the opinion of Lord *Eldon*.
4. Shares once vested by survivorship will not so vest again, except by express words.
5. The foregoing propositions illustrated by case of *Crowder v. Stone*.
6. The comments of Lord *Lyndhurst* in regard to the construction of "survivor."
7. This class of cases seems to turn a good deal upon the question of vesting.
- 8, and n. 13. The case of *Doe d. v. Wainewright* and others considered with reference to cross-remainders.
9. The more recent cases incline to hold the word "survivor" to its natural import, unless some other purpose is very evident.
10. No certain rule is deducible from the cases.

⁸⁹ *Dewar v. Maitland*, Law R. 2 Eq. 834.

⁹⁰ *Plympton v. Plympton*, 6 Allen, 178.

⁹¹ *Huston v. Cone*, 24 Ohio, n. s. 11.

11. Sir *James Wigram* held it could only be otherwise understood to escape consequences which it was very obvious the testator could not have intended.
12. Where the gift over is dependent upon the same event happening to all the prior donees, "survivor" must generally have the force of "other."
13. The courts still resort to this construction to carry out the clear intent of the testator.
14. The general nature of the provisions of the will may aid in reaching the sense of the word "survivor."
15. Where the primary donees are specified, the same is made more obvious.
16. "Survivor" will not be read as "other," if the gift over will thus become void for remoteness.
17. This is a misapplication of language, but one to be studiously avoided.
18. The words of survivorship will ordinarily be referred to the period of distribution.

§ 22. 1. THERE has been so much discussion upon the force and effect of provisions in wills and deeds for estates created in favor of "survivors," that it seems improper not to give some, although our space will allow us to give but a brief, summary of the decisions affecting the question. The great controversy seems to have been, whether the word "survivors" was to have its natural and literal force and construction, or be, *prima facie*, held equivalent to the word "other," and so construed in all cases, unless there was something, in the context or in the circumstances, to show that it was intended to be received in a strictly literal sense.¹

* 2. But it seems to be now established by numerous * 372 decisions that the same rule of construction will be applied to the word "survivors" as to any other. It will be received in its natural and literal import, unless there is something in the context or attending circumstances tending to a different conclusion.² Thus, in *Ferguson v. Dunbar*,³ Lord Chancellor *Thurlow* said, that

¹ *Barlow v. Salter*, 17 Vesey, 479. Sir *William Grant*, M. R., here treats it as matter of course to construe the word "survivors" as synonymous with "others," simply because that construction best conformed to the general sense of the clause, making all its provisions operative and reasonable. Mr. *Jarman* understands it to have been assumed, as the general rule, that "survivors" and "others" were convertible terms, not only in the case just cited, but "on more than one occasion" by "eminent judges."

² 2 *Jarman* (ed. 1861), 648. See *Doe v. Bradley*, 16 East, 399. Satisfaction of the portion of one of the devisees, where survivorship exists, has the same effect as his death, and the other takes the whole. *Folkes v. Western*, 9 Vesey, 456.

³ 3 Br. C. C. 469 and n.

although it was one of those cases in which he had the mortification to see that it was most probably the intention of the testator to have the share of the person dying without issue go to the other children and their respective heirs, in case of the decease of any, this could not be carried into effect without too great a departure from the language of the will. For although the testator meant by the use of the term "survivors" to include the children of deceased children, yet "not having said so, but limited such share to the 'survivors or survivor,' he must so declare." And a similar construction was adopted by Sir *R. P. Arden*, M. R., in *Milsom v. Awdry*.⁴

3. This question is discussed by Lord *Eldon*, Chancellor, in a later case,⁵ and the construction of the word "survivors" as equivalent to "others" declared to be a "forced construction of the term," and to have been adopted by the courts, with a view to admit after-born children to a participation of the devise over upon the presumption that such must have been the intention of the testator; but that construction was held to be an "unnatural" one, and to be excluded in that particular case, upon the ground that the legacy, which was mere personalty, created a vested interest in the children existing at the decease of the testator.

4. It seems to have been early adopted as a rule of construction,* in regard to shares which had once vested by survivorship, that they should not so vest again, unless by force of express words to that effect.⁶ This rule, although an arbitrary one, and one that Lord *Hardwicke* is said, in *Ex parte West*,⁶ to have disapproved in *Pain v. Benson*,⁷ and to have sought

* 5 Vesey, 465. But see *Arnold's Trusts*, in re, L. R. 10 Eq. 252, where this case is disapproved. See also *Wollen v. Andrews*, 9 J. B. Moo. 248; s. c. 2 Bing. 126.

⁵ *Davidson v. Dallas*, 14 Vesey, 576.

⁶ *Ex parte West*, 1 Br. C. C. 575; s. c. 1 P. Wms. 275, 276, in note.

⁷ 3 Atk. 78. But see *Ex parte West*, 1 Br. C. C. 575; *Rickett v. Guille-mard*, 12 Sim. 88. But the rule of not allowing an accruing interest by survivorship to be again transmitted in the same mode seems to be merely an arbitrary rule of construction, not founded in any presumption of intention on the part of the testator, and certainly should not be applied where it can be avoided. Lord *Hardwicke* was too sensible and independent a judge to feel much respect for any such rule of law, for which no better reason could be assigned than that it had been so held. But it seems firmly established in the English law. *Bright v. Rowe*, 3 My. & K. 316.

to escape from by finding a distinction which Lord *Thurlow*⁶ did not regard as sound, has nevertheless maintained its footing in modern days.⁸

5. The case of *Crowder v. Stone*⁹ illustrates the foregoing points very fully. The testator gave stock to trustees, to be divided, after the death of two persons who had a life-interest in it, among A., B., C., D., and E., in equal shares; and he directed, that, if any of them should die without issue before their shares should become payable, the share of such person or persons should go to, and be equally divided among, the survivor or survivors of them. A. died leaving issue, who were living at the time of distribution; then B. died leaving a son, who died without issue, before the time of distribution. Shortly afterwards, and before the time of distribution, C. died without issue. It was held that B.'s personal representative was not entitled to any portion of the fund; and that one-third of B.'s share, which on the failure of her issue survived to C., did not, on C.'s death, survive to the other legatees, but was transmitted to her personal representative; that the words "survivor or survivors" were to be construed in their natural sense, and not as equivalent to "other or others." So that no part of the shares of B. and C. went over to A.'s personal representative.

6. In the foregoing case Lord Chancellor *Lyndhurst* said, in regard to it having sometimes been held that "survivor" shall be * construed as equivalent to "other:" "It is a con- * 374 struction which the court may sometimes be compelled to adopt, in order to accomplish the intention which appears on the whole of the will." But his lordship quoted with approbation the language of Lord *Eldon*, already referred to, wherein he contrasts that construction with what he calls the "natural meaning" of the terms. And his lordship here refers to *Wilmot v. Wilmot*¹⁰ as a case where "it was scarcely possible to put any other meaning on the words." In this last case, as in many others, great stress is put upon the evident purpose not to have the gift over take effect in part only, as clearly indicating that the word "surviving" must be construed as synonymous with "other," or "living at the age aforesaid."

⁸ Lord *Lyndhurst*, Chancellor, in *Crowder v. Stone*, 3 Russ. 217.

⁹ 3 Russ. 217. But this case was lately held to be no longer law. *Mariott v. Abell*, L. R. 7 Eq. 478.

¹⁰ 8 Vesey, 10.

7. This class of cases seems to go mainly upon the ground that the remainder is a vested interest, and must therefore go to the representative of those of the class which have deceased before coming into the actual possession, and that, therefore, upon the decease of any of the class without issue, the contingency upon which the survivorship is made to depend, the estate in remainder will go not only to those of the same class in whom it had before vested, but that it must also go to the descendants of deceased members of the class, and to personal representatives of such deceased members, in case of personalty, in whom it vested upon the decease of those primarily entitled. Thus Lord *Eldon* concludes his opinion in *Wilmot v. Wilmot*¹⁰ by the use of language indicating, clearly, that he held it to turn exclusively upon the question of vesting: "I think they are right in contending that this vested."¹¹ What is here meant by "vesting" is, that it created such an estate in the party entitled in remainder as to be transmissible.¹²

8. It is upon this view that it has been held¹³ that limitations * 375 in a deed to trustees for the use of A. and B. for life, remainder to the use of the child or children of B. in tail as tenants in common, and if any such child should die without issue, the share of such deceased child to the use of the "surviving child or children," and their heirs, &c., "and in case all the children should die without issue," then over, created cross-remainders in the children of B.; and that, on the death of one without issue, his share vested in a surviving child or children, and in the heirs of a deceased child or children, as tenants in common.¹³

9. But it seems to be conceded by the most careful writers¹⁴ that the tendency of the more recent cases is in an opposite direction. This was so held by Lord *Brougham*, in *Ranelagh v. Ranelagh*;¹⁵

¹¹ See *Dawson v. Killet*, 1 Br. C. C. 119, 124; *Roebuck v. Dean*, 4 id. 403; s. c. 2 Ves. Jr. 265.

¹² Ante, pt. 1, pp. 388-393.

¹³ *Doe d. Watts v. Wainewright*, 5 T. R. 427. But it has often been held that cross-remainders cannot be implied in a deed, but must be raised by proper words, which Lord *Kenyon*, Ch. J., said, in *Doe d. v. Worsley*, 1 East, 416, 428, had been established for centuries in regard to deeds. But in *Wright v. Holford*, 1 Cowp. 31, it was held such cross-remainders might arise, in the case of a devise, by implication and presumption; and this rule as to wills seems not to have been questioned. Lord *Kenyon*, Ch. J., in *Doe d. v. Worsley*, supra. But see *Lawrence v. McArter*, 10 Ohio, 37.

¹⁴ 2 Jarman, 651.

¹⁵ 2 My. & K. 441.

but his lordship declared that the decision rested upon the circumstances of the particular case. The literal construction of the word "survivor" was adhered to in the case of *Cromek v. Lumb*; ¹⁶ and the fact, that, in another portion of the will, the word "survivor" was used in immediate connection with "other," thus showing that in that particular instance it was used as synonymous with it, was not regarded as sufficient to control its construction in that particular connection. But it is here conceded, as it has been held in other cases, that where the two terms are used in immediate connection, as being of equivalent import, it will preclude the possibility of restricting the two terms to the literal import of the word "survivor." ¹⁷

10. And it seems that in some cases it has been held, that where the gift over is combined with some collateral event, as well as the decease of the former holder, the probability that the testator intended to adhere to the strict meaning of the word "survivor" or "survivors" is materially lessened. Thus in *Aiton v. Brooks*, ¹⁸ * the word "survivor" was held equivalent to * 376 "other;" Sir *L. Shadwell*, V. C., saying this was matter of necessity, since "the testator contemplated the event, not of one of the legatees dying in the lifetime of the other, *but of one of them dying childless*." Mr. Jarman, in his latest edition, ¹⁹ very justly remarks, that, if this distinction had been adhered to, it might have saved some uncertainty and much confusion, "and a large amount of litigation would probably have been prevented." But unfortunately neither that nor any other certain rule seems fairly deducible from the cases, as to the precise reason which will justify reading "survivor" as equivalent to "other;" except that it is to be done, whenever, from the context or the other provisions of the will, it is rendered morally certain such must have been the intention of the testator.

¹⁶ 3 Y. & C. Eq. R. 565.

¹⁷ *Slade v. Parr*, 7 Jur. 102; 1 Y. & C. C. C. 565. So also in *Winterton v. Crawford*, 1 Russ. & My. 407, where the expression was "survivors or survivor and others or other of them," it was held that it could not be restricted to the survivor only. Sir *John Leach*, M. R., said: "The expressions of the testator are too precise to impute to him such an intention." And the word is to be referred to the time of the death of the testator. *Passmore's Appeal*, 23 Penn. St. 381; *Moore v. Lyons*, 25 Wend. 119; *Martin v. Kirby*, 11 Gratt. 67.

¹⁸ 7 Sim. 204.

¹⁹ 2 Jarman, 654.

11. And in an important and leading case,²⁰ Sir *James Wigram*, Vice-Chancellor, after reviewing the leading cases decided before that time and bearing upon the question, declares, that, where the courts have given the word "survivor" the force of "other," it has been done to avoid some consequence which it was very certain the testator could not have intended; as that the family intended to be benefited by the provision should fail of all advantage from it, by reason of the death of the parent leaving children; an event, indeed, which in reason the testator ought to have anticipated, but which he evidently did not. But such a result could not be attained, however desirable, where the testator's language was so specific as to admit of no such construction.

12. We have before incidentally alluded to the most potent ground which has been urged for construing "survivor" as synonymous with "other," — that is, the form of the gift over; as where the gift over is made dependent upon a certain event happening to all the prior donees, as that they die under age, or without issue, or both. In such cases it seems generally to have been held that the word "survivor" or "survivors," when used
 * 377 * in regard to one of the prior donees deceased, must be construed as only equivalent to "other or others;" thus clearly manifesting an intention on the part of the testator to make the gift over depend upon the failure of any of the prior donees to leave issue.²¹

13. The courts have manifested great readiness to construe

²⁰ *Leeming v. Sherratt*, 2 Hare, 14. See also *Willetts v. Willetts*, 7 Hare, 38; *Moate v. Moate*, 16 Jur. 1010. Some of the American courts have expressed reluctance to adopt the rule of construing "survivor" as equivalent to "other." *Doe v. Townsend*, 1 Houst. 365. But the rule is constantly acted upon in the English courts. *Hurry v. Morgan*, Law Rep. 3 Eq. 152. "Next surviving son" construed "next younger son." *Eastwood v. Lockwood*, id. 487. See also *Jackson v. Sparks*, 38 L. J. Ch. N. s. 75; *Brown v. Rainsford*, 16 W. R. 198; s. c. Ir. R. 1 Eq. 384; *Badger v. Gregory*, 17 W. R. 1090; s. c. L. R. 8 Eq. 78.

²¹ In addition to cases already referred to under this head, we may refer to *Cursham v. Newland*, 2 Bing. N. C. 58; s. c. 2 Scott, 105; s. c. 4 M. & Wels. 101; s. c. 2 Beav. 145; *Lowe v. Land*, 1 Jur. 377; *Cole v. Sewell*, 4 D. & War. 1; s. c. affirmed in House of Lords, 2 Ho. Lds. Cas. 186; *Smith v. Osborne*, 6 Ho. Lds. Cas. 375. And the word "survivor" may be construed as equivalent to "other" in one portion of the will, and according to its natural import in another portion, where this is necessary to give effect to the intention of the testator. In *re Palmer's Trusts*, 23 W. R. 478.

"survivor" as "other," whenever that became indispensable to carry out the intention of the testator;²² but in all other cases that is resisted, as will appear in all the more recent and well-considered decisions. And it is evident that cannot be done where the language of the devise is so specific as to exclude any such construction, although it may become indispensable to carry out the general intention of the testator. Where the language is so explicit as to exclude all construction, it must control, although thereby defeating, the obvious intent.

14. There are many cases, where, from the general nature of the provisions of the will, it is evident the testator intended to put the issue of any of the primary donees upon the same footing as the parent, in regard to every provision affecting the disposition of his estate; but where in the provision in regard to survivorship he has used the term "survivor" or "survivors," which in strictness will only include those of the same class of the primary donees, and thus exclude the issue of any deceased member of the class from all participation under the clause of survivorship,—in all such cases, the courts have very naturally concluded that the word "survivor" was used to indicate the other members of the class, and the issue of any deceased member.²³ But it is evident the testator may use language, even in cases of this character, so precise as to exclude the issue of a deceased member of the class of primary donees.

15. And where the gift is to specified persons, and not to a * class, and it is provided, that, upon the death of one or * 378 more without issue, the share of such deceased person or persons shall go to the survivor or survivors, it becomes very apparent that by "survivor" the testator must have intended to include the issue of such as predecease those who die without issue. If this were not so, and those who die without issue die last, there would be no mode of giving effect to the gift over.²⁴

16. But the courts will not adopt the construction of "survivor" as synonymous with "other," if the gift over will thereby be ren-

²² 2 Jarman (ed. 1861), 658.

²³ *Eyre v. Marsden*, 2 Keen, 564; s. c. 4 My. & Cr. 231; *Hawkins v. Hamerton*, 16 Sim. 410; *Peacock v. Stockford*, 7 DeG., M. & G. 129. And the early case of *Harman v. Dickenson*, 1 Br. C. C. 91, was decided upon the same ground.

²⁴ *Smith v. Osborne*, 6 Ho. Lds. Cas. 375.

dered void for remoteness. That is the ground chiefly relied upon, in *Turner v. Frampton*,²⁵ by a very learned and able equity judge, Sir *J. L. Knight Bruce*, Vice-Chancellor.

17. This seems to be one of those misapplications of language in drawing wills to which the most experienced and expert draughtsmen will sometimes be liable, and which is almost universal with testators, who naturally enough expect their wives and children, and all for whom they are making provision in their wills, to survive them, since that is the main purpose of making such provision. But the conclusion which testators not uncommonly adopt, of making all the contingencies named in their wills conform to the state of facts existing at the date of the will, when it is almost certain that many other changes will also have occurred, as well as the particular contingency provided for, often leads to very unexpected results. These considerations should induce all persons occupied in drawing wills to provide for possible
 * 379 contingencies * in the adoption of the more general terms, rather than those more specific, when speaking in regard to events too remote and uncertain to be strictly defined.

18. The time of determining the survivorship will not always be deferred until the period of distribution, but only till the death of that member of the class upon which event the survivorship takes effect.²⁶ But the general rule seems to be as determined in the House of Lords, that the words of survivorship will be referred to

²⁵ 2 Coll. 331. Where the term "survivor" is used with reference to a class, merely to indicate the term of an estate, those who de cease before the end of the term will transmit their share to their heirs or next of kin. *Bryan v. Twigg*, Law Rep. 3 Ch. App. 183. And bequests to several persons or their issue, or, if dying without leaving lawful male issue, to the survivor or survivors, was held to create an estate tail in the respective legatees. *Warren v. Travers*, Ir. R. 2 Eq. 455. The recent cases are numerous where "surviving" and "survivor" have been held equivalent to "other." *Jackson v. Sparks*, 38 L. J. Ch. n. s. 75; *Brown v. Rainsford*, 16 W. R. 198; s. c. Ir. R. 1 Eq. 384; *Badger v. Gregory*, 17 W. R. 1090. And where a residuary estate was given to A. for life, and after her death or marriage to eight persons by name, and, in case of the death of any of them before the death or marriage of A., the shares of him, her, or them, to be paid to the survivors or survivor, and they all died before the death or marriage of A., held that the estate over never took effect, and that the eight persons took interests transmissible to their representatives. *Marriott v. Abell*, L. R. 7 Eq. 478; s. c. 17 W. R. 569.

²⁶ *Wilmot v. Flewitt*, 11 Jur. n. s. 820.

the period of distribution, unless there is a clear indication of a contrary intent.²⁷

SECTION VIII.

GENERAL GROUNDS OF CONSTRUCTION APPLIED TO PARTICULAR LEGACIES.

1. Aid sometimes may be gained from the legacies preceding and following.
2. An annuity, without naming any limitation, held to be perpetual.
3. A lapsed legacy not revived by a codicil giving it to another. *Quære*.
4. Where a residue is given to legatees of legacies not exceeding £200, specific legacies and charities not included, but annuities are.
5. There seems to be no good reason for applying different rules of construction to wills from those applied to deeds.
6. Devise to widow and two daughters, how construed.
7. The word "heirs" held to be a word of limitation as to some, and of purchase as to others, in same bequest.
8. Portion of bequest held inoperative by reason of alteration of law.
9. The doctrine of *cy pres* applied to all cases, as far as practicable.
10. Effect of erroneous recital in will.
11. Bequest to wife in compensation of her patrimony treated as a debt. Devise of occupancy of house to widow.

§ 23. 1. It is common to gather some aid, in giving a definite construction to a particular legacy, from those legacies which immediately precede and follow it; although this must be confessed to be a somewhat unsatisfactory ground for varying what is the apparently natural construction of the words. But in a very recent case,¹ where the form of the legacy was £100, which * stood between two other legacies of £100, the dots between * 380 the figures being smeared, as if for the purpose of obliteration, it was held to be a legacy of £100.

2. And where the testatrix directed her executor to purchase an annuity of £50 in government securities, it was construed to be a

²⁷ *Young v. Robertson*, 8 Jur. n. s. 825; s. c. 4 Macq. 314; *Bowers v. Bowers*, L. R. 5 Ch. App. 244; *Newton v. Ayscough*, 19 Vesey, 534; *Hoghton v. Whitgreave*, 1 Jac. & W. 146. The period of survivorship may be determined by the context of the will. *Crozier v. Fisher*, 4 Russ. 398. An estate over, to take effect upon the decease of the first taker without issue then living, must operate by way of executory devise, notwithstanding any conveyance by such first taker. *Couch v. Gorham*, 1 Conn. 36.

¹ *Manchee v. Kay*, 3 Gif. 545.

perpetual annuity.² So in *Bent v. Cullen* (a) it is held that a distinct and unqualified gift of the income of a fund covers the fund itself. (b)

3. It seems that a lapsed legacy will not pass to another, to whom the testator bequeathed it, by a codicil made after the decease of the first legatee, but will be treated as intestate estate.³ But this is certainly not maintainable upon general principles. Such a bequest should be held the same as if in the original will it had been provided the legacy should go to the legatee named in the codicil, in the event of the death of the first legatee before the testator.

4. Where a residue is given equally to those of the legatees in the will, whose legacies do not exceed £200, specific legacies and charities will not be included; but the donee of an annuity of £36, valued at £140, will be.⁴

5. There has all along been a professed disposition among the courts to aid the purpose of the testator in carrying the apparent intention of the will into effect somewhat more liberally, by way of construction, than is held allowable in other instruments. But the distinction rests upon no well-defined or satisfactory grounds; and the sooner it is abandoned, the better, probably. Lord *Kenyon*, Ch. J.,⁵ regrets that any such attempt was ever made, and says: "Had there not been such a current of authorities, as we find in the books since the passing of the statute of wills, on the construction of wills, to further (as it has been called) the intentions of devisors, perhaps it would have been better that the same strict words had been required in testamentary dispositions of land as in those by deed."

6. Where the testator gave the use, improvement, and income of all his estate, after payment of debts, legacies, and expenses, to his widow so long as she remained unmarried, for the proper maintenance and education of his two daughters, but after the marriage of his widow directed the same to be equally divided between

² *Ross v. Borer*, 8 Jur. N. s. 1058.

(a) L. R. 6 Ch. App. 235.

(b) *Stokes v. Heron*, 12 Cl. & Fin. 161. See also *Hicks v. Ross*. L. R. 14 Eq. 141.

³ *Gibson*, in re, 31 Law J. Ch. N. s. 231, before Vice-Chancellor *Wood*.

⁴ *Nicholson v. Patrickson*, 3 Gif. 209.

⁵ *Denn v. Mellor*, 5 T. R. 558, 561.

* her and his two daughters, it was held to give her an absolute title to one-third and the use of two-thirds during widowhood.⁶ * 381

7. In a recent case,⁷ it was held that the expression of the testator of his will and desire in regard to his estate being distributed among his children must be considered dispositive, and that the use of the words "or their heirs," with reference to his children, was intended only to provide for the issue of those children who might de cease before the period of distribution arrived, and not for any new class of beneficiaries. They are merely words of limitation as to children themselves, but operate as words of purchase as to the issue of any children who might de cease before the vesting of the interest under the will.

8. Under the provisions of a will, giving the testator's wife all his estate during life or widowhood, and directing that, after the de cease of himself and wife, all his negroes should be free and each have two hundred dollars, and be conveyed to some place where they could enjoy their freedom, it was held, that, the widow being married again, by the terms of the will the negroes were not entitled to their freedom and legacies until after the de cease of the widow ; but that the amendment to the Constitution gave them the right to freedom and their legacies, but not to the expense of removal, the avowed object of that testamentary provision having now failed, or become useless.⁸

9. The courts have always inclined to apply the doctrine of *cy pres*, by carrying out, as nearly as practicable consistently with the established rules of law, all restrictions upon the enjoyment of property by successive owners or occupants. This principle is declared in an early case,⁹ and in a very recent case before the Master of the Rolls.¹⁰

10. An erroneous recital in a will that certain lands of which the testator was seised in fee-farm was settled on A. B. will not give him a life-estate therein, but will be sufficient to show they were not intended to be embraced in a general residuary devise.¹¹

⁶ Smith v. Smith, 11 Allen, 423.

⁷ Brasher v. Marsh, 15 Ohio, N. S. 103.

⁸ Parish v. Hill, 2 Duvall, 396.

⁹ Humberston v. Humberston, 1 P. Wms. 332.

¹⁰ Parfitt v. Hember, Law Rep. 4 Eq. 443.

¹¹ Harris v. Harris, Ir. 17 W. R. 790.

11. Where the testator gave a legacy to his wife to the full amount of her patrimony which had come into his hands, it was held such legacy was to be treated as a debt in the settlement of the estate, and made a charge upon the specially devised property as well as the rest of the estate.¹² And a devise to the wife of the free occupancy of the testator's house, after his decease, was held to give her the right, either to occupy it herself, or to let it to others.¹²

¹² *Mannox v. Greener*, L. R. 14 Eq. 456.

* CHAPTER III.

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UNCERTAINTY IN DEVISES, LEGACIES, AND TRUSTS.

SECTION I.

BEQUESTS OR TRUSTS VOID FOR UNCERTAINTY.

1. The difficulties of the subject stated with reference to courts and to cases.
2. The earlier cases upon the subject not reliable, unless reaffirmed by later ones.
- n. 3. Mr. Jarman's rule upon the subject.
3. Extremes should be avoided, as to certainty, in defeating or upholding wills.
4. Where a bequest is made to one by name, and there are two of the name.
5. Where the amount is wholly indefinite, the bequest must fail.
6. But this uncertainty is commonly removed by referring to the purpose of the testator.
7. And some indefiniteness of terms may be disregarded as an approximation.
8. Bequests not avoided because differently stated in different parts of will.
9. Uncertainty in the subject-matter to avoid a will must leave it mere conjecture.
10. The case of *Henry v. Hancock*, in the House of Lords, discussed.
11. Arbitrary rule adopted, to avoid uncertainty.
12. Devise of a portion of estate by acres, not separated from a large field, not void.
13. Bequests of part of a larger quantity gives the election to the legatee or devisee.
14. The gift of such as the legatee may select implies that the whole is not given.
15. Where an exception is so indefinite as to be unintelligible, it is void, and the whole passes.
16. The bequest of *that* vested in a mortgage will carry all invested in several mortgages.
17. A gift to the legatee not exceeding a given sum includes that sum.
18. A bequest of personal estate must be definite to create a trust in remainder.
19. Enumeration of indefinite expressions in will not sufficient to create trusts.
- n. 35. Enumeration and analysis of the cases upon this point.
20. Gifts of personal estate for life, with remainder over, perfectly valid.
21. Gift of what shall remain, with a power of appropriation, means what is unappropriated.
22. Bequest of the income of a fund, with power to apply the capital, is valid.
23. Questions of repugnancy in wills often more matter of construction than of necessity.
24. Bequests in trust for the life of another, being discharged, the heir entitled to surplus.

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- * 383 * 25. Devise of all, with a defined exception depending upon condition not performed, will pass all.
- 26. But a gift in parcels depending upon each other will wholly fail, if the parts cannot be ascertained.
- 27. A bequest of all, after certain illegal expenditures never ascertained, must fail.
- 28. But where the prior expenditure is capable of ascertainment, it will be done.
- 29. Where all of a fund is given in unascertained proportions, these may be determined.
- 30. And the indefiniteness of other funds to be created will not affect a definite legacy.
- 31. A bequest rendered uncertain, by double application, explainable by extrinsic evidence.
- 32. But a bequest uncertain upon its face cannot be so explained. Illustration.
- 33. Where the bequest includes all of a class, with an undefined exception, all will take.
- 34. Instance of uncertainty which will avoid bequest.
- 35. Bequest to persons or classes, in the alternative, void, unless uncertainty removed by construction.
- 36. Reference to extraneous facts may leave the bequest to mere conjecture, and void.
- 37. Bequest to several in succession, the order of succession will be determined by construction.
- 38. Charitable bequests will not fail by reason of the uncertainty of the object.
- 39. How far inaccuracy of one or more particulars of the description will avoid a bequest.
- 40. Same rule applies to errors in description of the subject as of the object of a devise.
- 41. The name of a devisee being correct, will, in general, control the matter.
- 42. But the certainty in the name must be sufficient to remove the uncertainty of description.
- 43. And where the name is imperfect or erroneous, description may remove uncertainty.
- 44. This has been carried so far as to reject one name, and substitute another.
- 45. Some extreme cases occur where description supersedes the name.
- 46. Where the name and description both fail to identify the devisee, the devise void.
- 47. But where the description is supported by circumstances, it controls the name.
- 48. The will must be incapable of any clear meaning to be held void for uncertainty.
- 49. Mere error or defect in name or description not sufficient.
- 50. In America, uncertainty will not avoid will, unless it leave it to mere conjecture.
- 51. A very indefinite bequest to charity recently sustained.
- 52. Bequest to each of a class will embrace all the members, notwithstanding an error in the number.

§ 24. 1. THE subject of uncertainty in wills has been incidentally alluded to in many of the preceding chapters;¹ but it seems requisite to devote some space specifically to that topic. We cannot

¹ Ante, pt. 1, § 32.

forbear to say, in limine, that this is one of those subjects where * the decisions are so much affected by peculiar circumstances, that one case will afford very little aid in determining another not very similar in its state of facts. We think, too, that this class of cases, when not coming within any precise rule or exception connected with the subject, is liable to be determined very much upon the taste or the whim of the court. One judge will be so much impressed with the importance of making every will intelligible, and allowing no obstacle to defeat the purpose of the testator, that he will always find some way of escape from all perplexities of the kind. Another will dwell so much upon the importance of keeping all exposition within the range of the words of the will, that he will often allow uncertainties, which embarrass no one but himself, to mystify and obscure his perception, to such an extent, that his decisions will often seem to partake more of the character of ingenious doubts, than of sound expositions of the best mode of escaping doubts.²

2. We shall not attempt to analyze and classify the early cases upon this subject, except as they have been recognized in the later decisions, in support of some general rule of construction affecting the question of the degree of uncertainty which will render a testament void.³ We agree fully with the leading proposition

² 1 Jarman (ed. 1861), 330 et seq. This very sensible writer dwells very much at length upon the favorable construction which wills have received, out of deference to the ignorance and inexperience of testators, who often attempt either to make or alter their wills, citing 3 Keble, pl. 23, 49; *Henniker v. Henniker*, 12 Jur. 618; *Baker v. Newton*, 2 Beav. 112; *Langley v. Thomas*, 6 DeG., M. & G. 645. In the case of *Baker v. Newton*, the M. R., Lord Langdale, held the bequest void for uncertainty, when it would seem not very difficult to conjecture what the testator must have intended. And in *Langley v. Thomas*, although the Vice-Chancellor, *Stuart*, and the Lord Chancellor, *Cranworth*, held precisely opposite views of the meaning of the testator, the will was upheld by both of them, upon their differing theories. These cases will illustrate our meaning in what we have said in the text.

³ 1 Jarman (ed. 1861), 331. This reliable writer here says: "In modern times, instances of testamentary gifts being rendered void for uncertainty are of less frequent occurrence than formerly, which is owing, probably, in part to the more matured state of the doctrines regulating the construction of wills, which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practised skill of the courts in applying these doctrines. Hence the student should be cautioned against yielding implicit confidence to any early cases in which a gift has been

contained in Mr. Jarman's testimony on this point ;³ but we
 * 385 * believe the first reason assigned by him for the result has
 very little to do with it, and that the chief reason why courts,
 in the later cases, have felt reluctant to admit uncertainty as a
 ground of avoiding the formal disposition of property, will be found
 in the very general feeling in all judicial tribunals, whether in this
 country or in England, that the earlier decisions upon this point
 were, many of them, unreasonable and indefensible, and not a few
 of them verging very closely upon the ludicrous and the absurd.
 The consequence of this conviction has been, that in some instances
 there has been manifested a disposition to press towards the oppo-
 site extreme ; and instead of yielding to slight grounds of doubt
 and uncertainty, there may be some cases found where the courts
 seem to have supplied the most important provisions in wills, upon
 grounds little short of mere conjecture, and, by supplying defects
 and altering the arrangement of the materials, rather to have
 made a new testament for the party, than to have given an allowa-
 ble construction to one already in existence.

3. We should certainly not feel disposed to encourage the adop-
 tion of either extreme. But we believe it will be found, that in
 very few cases are wills so defective and confused as to be incapa-
 ble of being brought into harmony and intelligible meaning, by fair
 and allowable construction, within the ordinary range of judicial
 administration ; and it is clearly the duty of courts to uphold every
 contract, and especially every instrument of a testamentary char-
 acter, where the thing can fairly be done ; and it is little creditable
 to courts to evade just responsibility in such cases by shielding
 themselves behind some antiquated case, which might seem to
 justify a decision against its validity on the ground of uncertainty,
 when, at the same time, every member of the court is convinced,
 from the words of the will, what the testator must have intended,
 and that he could have meant nothing else. We should at the
 same time deprecate that latitudinarian mode of construction,
 whereby courts have attempted to bridge over every chasm in the
 language, however broad and impenetrable, by a lawless resort
 to conjecture, based upon no recognized canons of construction ; or
 what is still more objectionable, if possible, by an utter disregard

held to be void for uncertainty, the principle whereof has not been recognized
 in later times." Citing *Pride v. Atwicke*, 1 Keb. 692, 754, 773; *Price v. War-
 ren*, Skinner, 266; s. c. 2 Eq. Cas. Ab. 356, pl. 2.

of the natural and ordinary meaning of the words used, and guided * only by that undefined light of extrinsic circum- * 386 stances, in no just sense admissible in aid of the legal construction of the instrument.⁴

4. It is laid down by Swinburne,⁵ that a bequest to any person by name, where there are two persons by the same name, and no means of determining which was intended, must be held wholly void; and we do not perceive any ground of escape from such a result, where there is no ground whatever, either in the words or the circumstances, to incline us to believe that the testator meant one of the persons of that name more than the other. But we conjecture that such a case would never occur; and if it did, there is, perhaps, no more reasonable mode of escape than to make the two, tenants in common, or joint legatees, in analogy to the rule where the same thing is given to two different persons in the same will; but no such rule is yet established. (a)

5. So, too, if the testator give an entirely indefinite amount of property, as “*some* of my best linen,”⁶ or “a handsome gratuity

⁴ The case of *Bowman v. Milbanke*, T. Ray. 97, shows upon how slight grounds courts have sometimes doubted. The words of the bequest found by the special verdict were, “I give all to mother, all to my mother;” and it was held lands did not pass, as it was wholly doubtful and uncertain to what the word “all” referred. 1 Lev. 130; Sid. 191; 1 Jarman, 331. It may be uncertain what is included under the word “all.” That must be determined by proof of what the testator had; but it is certain, by such a form of expression, twice uttered, he could scarcely mean less than he said, “all,” “all.” Almost any one, unless it were an equity judge (some disciple, perhaps, of the great prince of doubters, Lord *Eldon*), would find it difficult to raise a doubt in such a case; and if he could succeed in conjecturing different meanings which the testator might have had, we believe a delicate man would feel some reluctance at the expression of such doubts, unless they rested upon grounds more substantial than any which now occur to us. A somewhat similar case, but one of more uncertainty, is that of *Mohun v. Mohun*, 1 Swanst. 201, where the testator gave to all his grandchildren, “share and share alike,” without saying what he gave. It is pretty obvious he must have intended all the residue of his estate not otherwise specially disposed of; but the court resisted this interpretation upon the ground that it required an unauthorized transposition of the words, which it has been held is not admissible, except upon clear grounds. Ante, pt. 1, § 33, 34.

⁵ Swinb. on Wills, pt. vii. § viii. pl. 1-4, where the circumstances which may determine the point are enumerated. *Richardson v. Watson*, 4 B. & Ad. 798.

(a) Ante, pt. 1, § 32, pl. 1.

⁶ *Peck v. Halsey*, 2 P. Wms. 387.

to each of my executors,"⁷ it has been held a void bequest.

* 387 But * in the former case, *Sir Joseph Jekyl*, M. R., in the decretal order recommended the residuary legatee, "since it was plain the testatrix intended some linen," "to give some of the best of the testatrix's linen to the legatees." But in the latter case, *Sir L. Shadwell*, V. C., said, "I shall not give any such recommendation," "as I do not think I am at liberty to do so;" which seems very certain, unless the judge could define the amount.

6. But in later cases, under the administration of the more learned and experienced equity judges, many bequests of this general and indefinite character have been rendered sufficiently certain to be carried into effect by looking carefully into the general purpose in the mind of the testator, and which he desired to accomplish by the provisions of his will. Thus, where the testator desired his executors to retain a sufficient sum of money to remunerate them for their trouble, it was referred to the Master to state the amount which would be a reasonable compensation for the service.⁸ And the same course has been pursued where the provision was expressed to be for the support and maintenance of a person, either in whole or in part. This is a matter easily susceptible of estimation, with reference to the circumstances and condition of the person.⁹ And even where a provision is made for the support of a widow, by means of the income of the residue of the estate, and "in case any thing should occur that her income is not sufficient, she shall be at liberty to go to the principal," the income of the residue proving insufficient, it was held the widow could only go to the corpus of the fund to make up the deficiency, so as to produce an amount "sufficient to afford her a maintenance suitable to her station in life, and that this appeared to be about £60 a year clear every thing."¹⁰

⁷ *Jubber v. Jubber*, 9 Sim. 503.

⁸ *Jackson v. Hamilton*, 3 J. & La Touche, Irish Eq. temp. *Sir Ed. Sugden*, 702.

⁹ *Broad v. Bevan*, 1 Russ. 511, n.; *Pride v. Fooks*, 2 Beavan, 430. It was here held, that the provision for the maintenance of a daughter did not cease upon marriage, until twenty-one; and a provision for trustees expending money for the advancement of such a child extended beyond the period of marriage and majority. See also *Kilvington v. Gray*, 10 Sim. 293; *Batt v. Anns*, 11 L. J. Ch. n. s. 52; *Thorp v. Owen*, 2 Hare, 610.

¹⁰ *Sir John Romilly*, M. R., In re *Pedrotti's Will*, 27 Beavan, 583. The counsel for the widow here claimed the whole fund, and cited *Methold v.*

* 7. And a bequest for accumulation,¹¹ until the interest * 388 shall amount to "£3,000, or thereabouts," although extending beyond the limits of the law rendering bequests void for remoteness, is nevertheless valid within the legal limits for accumulation, and not void for uncertainty, the terms of the bequest leaving nothing uncertain, except to bring the accumulation as near £3,000 as it could be done by the combination of even dividends.¹²

8. And a bequest is not held void for uncertainty because it is differently stated, as to the amount, in different portions of the will,—as where in one part of the will it is called £30,000, and in other parts of it £20,000,—if from the whole will it can be determined, with reasonable certainty, which sum was really intended by the testator.¹³

9. After an examination of the cases to a considerable extent, it was held, that a devise of land, "which I purchased, lying on the main, supposed to be in the State of Vermont," it appearing that the testator owned one right of land in the township of Burlington, in the State of Vermont, was not void for uncertainty.¹⁴ The court here say: "A devise or grant is only declared void for uncertainty when, after the resort to oral proof, it still remains mere matter of conjecture what was intended by the instrument."

10. There is one case¹⁵ where the subject of uncertainty

Turner, 4 DeG. & Sm. 249; *Rudland v. Crozier*, 2 DeGex & Jones, 143; *Cowman v. Harrison*, 10 Hare, 234. That the general intent will control all. *Lassiter v. Wood*, 63 N. C. 360.

¹¹ *Oddie v. Brown*, 4 DeGex & Jones, 179, before the Lord Chancellor and the Lord-Justices. The counsel, in favor of maintaining the bequest, cited, upon the question of certainty, *Seale v. Seale*, 1 P. Wms. 290; and those opposed relied upon *Cherry v. Mott*, 1 My. & Cr. 123.

¹² 1 Jarman, 332.

¹³ *Philipps v. Chamberlaine*, 4 Vesey, 50; *Mellish v. Mellish*, id. 45.

¹⁴ *Townsend v. Downer*, 23 Vt. 225.

¹⁵ *Jones d. Henry v. Hancock*, 4 Dow, 145. The devise over was no more uncertain than the provision for the daughter. Both depended upon contingencies, and some degree of uncertainty, even after the contingency of the marriage was determined. It was then the same as if the testator had given his daughter an amount equal to the estate of her husband, or equal to the estate of any other man named. This may certainly be regarded as a somewhat indefinite measure of quantity; but there is no uncertainty whatever in regard to the intention of the testator. The uncertainty is dependent wholly upon the indefiniteness of the measure adopted by the testator. But this is

* 389 in a * will is very much discussed, and where it seems to us the decision of the House of Lords should be regarded as questionable. The testator devised lands to his daughter, in tail, upon condition she married a man of property at least equal to that left her by the testator; and if she should marry a man with less than that, "I leave her only as much of mine as shall be equal to the property of the man she marries;" and the remainder, it was provided, should, in that event, immediately go to others named. It was held that the devise over was void for uncertainty.

11. Courts have sometimes resorted to an arbitrary rule of construction in order to save avoiding a bequest for indefiniteness; as, in the case of a devise to two persons, in such proportions as — shall determine, it has been held to create a tenancy in common in equal shares, the same as if nothing had been said of the mode of

entirely dependent upon circumstances. A man's estate may be the most indefinite thing in the world, or it may be as certain as figures can make it. It may consist wholly of public stocks, standing in his name in the Bank of England. And is it proper to characterize such a devise as uncertain merely because the amount is not expressed in words upon the face of the will? If that were so, every devise which refers to extraneous facts to render it certain would, for that reason, be held void; which no one could well claim in regard to any written instrument. In later years, certainly, it is the practice of courts to overcome all such mere indefiniteness of description by reference to some appropriate tribunal to determine the facts, which may be done by approximation at least, as it has to be in the majority of cases upon all subjects. It would hardly be claimed at the present day, that a legacy, equal to what property a man's sons should severally have accumulated at the age of thirty, to be paid upon arriving at that age, respectively, would be void for uncertainty. And if not, the gift of the residue would be no more so, except as it depends upon the double, or, as it might be, the tenfold uncertainty of the amount of the testator's estate, and that of his sons also. If a bequest is to be declared void for uncertainty because it depends upon the amount of another man's estate, a residuary bequest ought, upon the same principle, to be regarded as void; for that depends, not only upon the uncertainty of the testator's property, but upon many other contingencies. It seems to us that the case of *Jones d. v. Hancock*, *supra*, does not involve any such uncertainty as will ever affect the validity of a bequest, but only an indefiniteness of measure, which always attaches to a residuary bequest, and which may attach to a particular legacy or devise, without affecting its validity, but must be overcome by proof, the same as other difficulties of the kind have to be overcome. *Hoffman v. Hankey*, 3 My. & K. 376, is a case of mere conjecture as to the intent. But in *Rickards v. Rickards*, 2 Y. & C. C. C. 419, a case of great indefiniteness in regard to the subject-matter, the uncertainty was overcome by extrinsic proof.

determining the shares, leaving it in that defective form really amounting to nothing.¹⁶ And upon the same principle an equal division is made, where the donee of a power of distribution fails to exercise the power.¹⁷ And so also where an estate is conveyed * to trustees for the benefit of the testator's eldest * 390 son, but so that the younger children of the testator may participate with their elder brother, and that their mother should also participate with him in the same, and that this request of the testator might be particularly observed, but the proportion, or mode of the participation, was not in any other way defined, it was held, that a valid trust was thereby created, in favor of the younger children, to participate as tenants in common in equal proportions.¹⁸

12. So also a devise of a certain number of acres out of a field, or out of a larger number of acres, and so of any other thing, is not void, for the reason that the particular subject-matter of the bequest is not definitely pointed out, but the devisee will take, either as tenant in common, or such as he shall elect, or by division by commissioners, according to the particular circumstances of the case and the nature of the subject-matter, as well as the particular context of the will and the attending circumstances.¹⁹

13. Where a general grant is made of ten acres of ground, adjoining or surrounding a particular house, part of a larger quantity of ground, the choice of such ten acres is in the grantee, and a devise to the like effect is to be considered the same as a grant.²⁰ And the same rule has been extended to a bequest of personalty of a given number of articles, forming part of a stock of articles of the same description; as, for instance, where one gives six out of his stock of twenty horses in the stable.²¹

14. And where the bequest is of such articles of property, of a particular kind, as the legatee may select, this, it is said, implies, by the very use of the word "select," that the whole shall not be

¹⁶ *Robinson v. Wheelwright*, 21 Beavan, 214.

¹⁷ *Salisbury v. Denton*, 3 Kay & J. 529.

¹⁸ *Liddard v. Liddard*, 6 Jur. N. S. 439.

¹⁹ *Peck v. Halsey*, 2 P. Wms. 387; *Grace Marshal's Case*, Dyer, 231 a, n.; 8 Vin. Ab. 48, pl. 11.

²⁰ *Hobson v. Blackburn*, 1 My. & K. 571.

²¹ *Jacques v. Chambers*, 2 Coll. C. C. 435; *Duckmanton v. Duckmanton*, 5 H. & N. 219.

taken. But what particular proportion, less than the whole, may fairly be claimed, seems not very well settled.²²

15. Where the bequest is of all except a certain amount, and the exception is so indefinite that it cannot be determined,
* 391 the whole * will pass.²³ But the court will in such cases, as in all others, resort to all reasonable grounds of intendment in order to determine which subject-matter was referred to by the testator; as where the devise excepts a farm in the possession of T. H., and there were two farms so situated, but one of them was held by the testator as trustee, the court presumed the testator must have intended to except the other.²⁴

16. And where the testator bequeathed all his property in the Austrian and Russian funds, and also *that* vested in a Swedish mortgage security, the testator having, at the date of the will, several sums invested on different Swedish mortgages, the Vice-Chancellor said, "The words were equivalent to 'all my property vested in Swedish mortgage security,'" and that all would pass.²⁵

17. A gift to the legatee, by way of trust, or in any other form, of a sum of money, not exceeding a prescribed limit, where there is no discretion reposed in any particular person or persons to fix the amount, is good for the full sum.²⁶ It will receive the most liberal construction in favor of the legatee.²⁷

²² *Kennedy v. Kennedy*, 10 Hare, 438. But a power to a feme covert to appoint "any part of testator's residue" implies no selection, and the donee may appoint the whole. *Cooke v. Farrand*, 7 Taunt. 122.

²³ *Blundell v. Gladstone*, 14 Sim. 83.

²⁴ *Blundell v. Gladstone*, on appeal, where the former decree is reversed. 3 M. & Gord. 692.

²⁵ *Richards v. Patteson*, 15 Sim. 501.

²⁶ *Thompson v. Thompson*, 1 Coll. C. C. 395; *Cope v. Wilmot*, 1 Coll. C. C. 396, n.; *Gough v. Bult*, 16 Sim. 45. In the last case cited the Vice-Chancellor said: "I cannot think that no sum was to be raised, merely because the expression is: 'Any sum not exceeding £2,000.' It seems to me that it would be quite ridiculous to say, that, because they had not fixed the sum, therefore nothing was to be raised; and I think that John had a right, *prima facie*, to have £2,000 raised, unless some other sum was fixed upon." And in *Cushman v. Horton*, 59 N. Y. 149, where the estate in remainder in £2,000, by the terms of the will, was given to "the heirs" of one who in fact survived both the testator and the life-tenant, it was held that the use of the sum must go to the residuary legatee until the decease of the person named, when, his heirs being known, their estate would take effect in possession.

²⁷ *Seale v. Seale*, 1 P. Wms. 290. This was where a sum of £300 or £400

18. Legacies of what shall remain or be left at the decease of the prior legatee, where the estate is indeterminate, and where the prior legatee has the power to exhaust the whole, is not sufficiently certain to create a valid trust. For that purpose, the objects must not only be defined, but the subject of property precisely ascertained, so as to be incapable of diminution by the first legatee for life.²⁸ Accordingly, where the bequest was of copyhold lands to * one for life, and other property for her maintenance, * 392 upon full trust and confidence, that, in her justice and equity, she, at her decease, would make a proper distribution of what effects might be left, to the testator's children, it was held to create a resulting trust, as to the balance of the money produced by the sale of the copyhold estate, in favor of the heir, but that the widow was entitled to the absolute interest in the other personal estate.²⁹

19. And where personal estate is given absolutely to one, with no limitation or restriction upon his title, a subsequent bequest of so much as the legatee should be possessed of at the time of his death without leaving issue, is void, as being repugnant to the first bequest.³⁰ And a mere request that the first donee will consider others as the children of the testator and the donee, unless expressed in such terms as to create a trust, is void.³¹ So also where £300 was in the hands of trustees, subject to the appointment of the wife, who appoints it to her husband, but so much as shall be remaining at his death to her brothers and sisters, it was held that the property vested absolutely in the husband, the property not being sufficiently certain to create a trust in favor of the donees over.³² And these expressions in regard to the interest

per annum was directed to be raised ; and the Lord Chancellor said, " I will construe it in the most liberal sense," and gave the £400. See also *Haggar v. Neatby, Kay*, 379.

²⁸ *Bland v. Bland*, 2 Cox, 349 ; *Wynne v. Hawkins*, 1 Br. C. C. 179.

²⁹ *Wilson v. Major*, 11 Vesey, 205.

³⁰ *Attorney-General v. Hall*, cited in 2 Cox, 355, n. *Annin's Ex'rs v. Vandoren's Adm.*, 1 McCarter, 185 ; *Cleveland v. Havens*, 2 Beasley, 101 ; *Fairchild v. Crane*, 2 Beasley, 105 ; *Condict v. King*, id. 375 ; *Pruden v. Pruden*, 14 Ohio, n. s. 251.

³¹ *Pope v. Pope*, 10 Sim. 1 ; *Cuthbert v. Purrier*, Jac. 415.

³² *Sprange v. Barnard*. 2 Br. C. C. 585, 587. But a devise, almost in the same terms, in *Upwell v. Halsey*, 1 P. Wms. 651, was held to create a trust. *Mr. Jarman*, vol. 1, 336 (ed. 1861), says, " It seems this case cannot now be

in personal estate given to one, by which some indefinite interest over is attempted to be created on behalf of another, have been held not sufficient to create a valid trust: what he can transfer;³³ or what he can save out of his yearly income;³⁴ or what remains undisposed of, or is not disposed of by deed or will.³⁵

* 393 * 20. But there seems no question, that if the testator choose to give personal property, or real and personal together, for life, with a gift over for the benefit of another, he may do so. And it has always seemed to us, that many of the cases bearing upon this question, some of which we have referred to elsewhere, and others of them in the present chapter, were decided upon rather questionable, not to say frivolous, grounds; at all events, such as were more calculated to defeat than to promote the intention of the testator. We see no possible reason why such a bequest may not be as well maintained as any other. If the particular articles intended to be included in the bequest are indefinite, and incapable of strict identification; the legatees in the first instance, as well as those in remainder, will have to run their own risk about finding the estate. But there seems to be no question whatever that the gift is valid; and courts of equity will carry it into effect, as far as its subject-matter can be ascertained.³⁶

considered law." And this case is doubted by Lord *Loughborough*, in *Malim v. Keightley*, 2 Ves. Jr. 529, 532, and by Sir *E. Sugden*, in 1 Ll. & G. 298.

³³ *Flint v. Hughes*, 6 Beav. 342.

³⁴ 1 *Jarman*, 336 and note.

³⁵ *Bourn v. Gibbs*, 1 Russ. & My. 614; *Ross v. Ross*, 1 Jac. & W. 154; *Bull v. Kingston*, 1 Mer. 314; *Grey v. Montagu*, 2 Eden, 205; 3 Br. P. C. 315; *Phillips v. Eastwood*, 1 Ll. & G. 270; *Watkins v. Williams*, 3 M. & Gord. 622; *Re Yalden*, 1 DeG., M. & G. 53; *Borton v. Borton*, 16 Sim. 552.

In the last case cited, the former cases are reviewed to some extent, and the Vice-Chancellor, *Shadwell*, comes to the very natural conclusion, that, where it is obvious the testator intended to create an absolute interest over, there can be no more rational way of construing his will than to give effect to that intention so far as the same may be practicable. It was accordingly held, where the testator gave the residue of his personal estate to trustees in trust for his wife for life, and after her death to his daughter, who was an infant at his death, "the same to be always considered as vested in her, upon her attaining twenty-one, and to be subject to her disposition thereof," and by a subsequent clause the testator gave the money over in case his daughter should die under twenty-one, or die without disposing of the property by her will, that the daughter was entitled to the property, not absolutely, but only for life, with a power to dispose of it by will.

³⁶ *Andrew v. Andrew*, 1 Coll. C. C. 690, where it is held, that consumable articles will not go over upon such a bequest, but fall into the residue; which

* 21. A gift of what shall be left, or of what shall remain, * 394 preceded by a power of disposition or appropriation reserved to the trustee, naturally refers to what shall be unappointed or unappropriated by the trustee under the power reserved to him; as where the testator bequeathed his household goods to his wife for her life or widowhood, with power to sell the same, as she should think proper, for her own benefit and the maintenance of others named, during minority, with a bequest over, upon the death or marriage of his widow, of so much as should then remain, it was held the widow was entitled to a life-estate in such property, or one during widowhood, with the power to apply any part of the capital for her own benefit, and the proper maintenance of the persons named, during minority; and that, upon the death or marriage of the widow, the remainder of the capital was well limited over.³⁷ This seems to us the just and sensible rule upon the subject.

22. And where the testator bequeathed the residue of his estate to trustees, upon trust to permit his wife to receive the annual produce during her life, and also to apply to her own use such parts of the capital as she should think proper, and, after her decease, to stand possessed thereof upon trust for such persons as she should by will appoint, and, in default, in trust to pay certain legacies, it was held that the widow took a life-estate only, with

seems to be a distinction not based on principle. Consumable articles bequeathed to one for life, and afterwards to another, will naturally create a more precarious gift over; but, if actually in existence at the termination of the first estate, it seems rather fanciful to say they shall go in a direction opposed to the will, merely because they were of a perishable character, and might have been exhausted by the first estate, if it had continued long enough. That is true, in a measure, of all specific chattels; and still there is no question they may be bequeathed in succession. *Cooper v. Williams*, Prec. in Ch. 71; *Constable v. Bull*, 3 DeG. & Sm. 411; *Borton v. Borton*, 16 Sim. 552; *Gibbs v. Tait*, 8 Sim. 132. See, to same effect, *Healey v. Toppan*, 45 N. H. 243. If the terms of the bequest are doubtful, the character of the property might have weight in fixing its import; but if the income is given to one during life, and the fund directed to be transferred to his personal representative, it must create an absolute gift presently. *Blake's Trusts*, L. R. 3 Eq. 799; *Alger v. Parrott*, Law Rep. 3 Eq. 328. But there is no insuperable difficulty, if such is the clear intent, in creating a life-interest in stocks. *Blake's Trusts*, supra. See ante, § 17, pl. 24 et seq.

³⁷ *Surman v. Surman*, 5 Madd. 123.

power of disposition of the capital during her life, and of appointment by will, and not an absolute interest.³⁸

23. It seems to be considered that if the will contain an absolute and unconditional disposition of real or personal estate, or of both combined, and in other portions of the same instrument there be found a bequest over of the same estate, after the death of the first donee, it will be regarded as repugnant to the first gift, and void.³⁹ But this is very much matter of construction, and

* 395 the * whole will is to be considered together, and to be supposed to have all been in the mind of the testator when he penned each separate provision. In this mode of viewing the matter, no invincible repugnancy will occur in any such provision.⁴⁰

24. And where the bequest is of the whole or any part of the rents, issues, and profits of real and personal estate, and was made for the maintenance of an imbecile, and it appearing that such part of the rents, issues, and profits, as was requisite for the accomplishment of the object, had been applied, and that the person to be benefited had deceased, it was held that the trust for his benefit was discharged, and that the surplus income of the personal property passed to the residuary legatees, and the surplus income of the real estate, there being no devise of them, passed to the heir at law.⁴¹

³⁸ *Scott v. Josselyn*, 26 Beav. 174. In favor of the life-interest in the wife were cited *Reith v. Seymour*, 4 Russ. 263, *Re Sanderson's Trusts*, 3 Kay & J. 497, in addition to cases already cited; and on the other side, the counsel cited *Hughes v. Ellis*, 20 Beav. 193; *Holmes v. Godson*, 2 Jur. n. s. 383; *Barton v. Barton*, 3 Kay & J. 512.

³⁹ *Holmes v. Godson*, 2 Jur. n. s. 383, decided by the Lords Justices in the Court of Chancery Appeal in March, 1856. And the same point is decided as to personal estate as early as *Lightburne v. Gill*, 3 Br. P. C. 250; *s. p. Perry v. Merritt*, 22 W. R. 600; *s. c. L. R. 18 Eq. 152*.

⁴⁰ *In re Yalden*, 1 DeG., M. & G. 53; *Doe d. Stevenson v. Glover*, 1 C. B. 448.

⁴¹ *Re Sanderson's Trust*, 3 Kay & J. 497. The distinction between a gift of "the whole or any part," and a gift of the entire fund or interest (as the case may be), is here examined, and the conclusion reached, that in the former case the surplus is undefined, and in the latter case the whole fund goes to the first donee, although the purpose fails, the court regarding the purpose stated in the will as the motive of the gift rather than the object. See *Cope v. Wilmot*, 1 Coll. C. C. 396, n.; *Hanson v. Graham*, 6 Vesey, 249. But see *Gude v. Worthington*, 3 DeG. & Sm. 389. See also *Hamilton v. Downs*, 33 Conn. 211.

25. Upon a devise of all the testator's property in trust for his niece, subject to a discretionary power in the trustees, on her attaining twenty-one or marrying, to settle the whole, or such part as they should think fit upon her, and her children if she should have any, with remainder, in default of children, to her mother absolutely, the niece attaining twenty-one, but dying before any settlement was made under the power, without being married, it was held that the power could not then be exercised, and that her heir was entitled to the whole of the real estate.⁴²

26. But it has been held, that where the gift, instead of being, as in the preceding cases, of all except what had been otherwise well disposed of, pointed to the distribution of the fund by parcels, to different persons, each of the parts depending upon the ascertainment of the others, and from the indefiniteness of the language, or some other cause, it became impracticable to ascertain the parts upon which the extent of the other portions depended, the whole * must fail. As where the testatrix gave such of * 396 her jewels as should at her death be deposited in her jewel-box, at a place named, to persons whose names would be found written on a paper contained in the box, and bequeathed the rest of her jewels to A. B., and two years before her death the testatrix became lunatic, and subject to a commission, and no jewel-box was, at the date of the will or at the time of her death, deposited at the place named, nor was there any written paper designating who was to take the jewels, it was held that the intended gift of the jewels wholly failed.⁴³ And where the testator devised all his houses in Southwold to trustees, in trust for his wife for life, and, after her death, in trust to convey one of them, whichever she might choose, to his daughter M. and her heirs, and to convey all the others to his daughter C. in fee, and M. died in the testator's lifetime, whereby her election became impossible, the other daughter surviving the testator, the court held she could take none of the houses, inasmuch as her right was only to what remained after the selection of one out of the number, in a particular mode, which

⁴² *Lancashire v. Lancashire*, 2 Phill. C. C. 657.

⁴³ *Jerningham v. Herbert*, 4 Russ. 388. The Master of the Rolls, Sir *John Leach*, said "that the will contained no present gift of the jewels and other specified articles, but referred to a future act, to be done by the testatrix, in order to complete her gift; and that, this future act being prevented by the subsequent lunacy, the intended gift of the jewels wholly failed."

had become impossible, by reason of which no title ever vested as to the remainder, which must for ever remain unascertained.⁴⁴

27. It has been held, that where the remainder of a fund is given, after providing for the erection of a chapel, or alms-houses, or any other indefinite expenditure, which happens to be against the law, the gift of the residue will fail, because of the difficulty of ascertaining that which would remain over and above what would have been requisite for the illegal object: the failure is, therefore, upon the ground of uncertainty.⁴⁵

28. But where the deduction or charge is readily ascertainable, it will be done by reference to a master, and the gift of the
* 397 * remainder upheld;⁴⁶ as where the testator, after making certain dispositions of his property, provided that his executors should purchase and prepare, for the ultimate deposit of his own body, and for the removal and deposit of certain of his relatives named, lying interred in another place, a certain piece of unconsecrated ground then belonging to another person, on which they were to build a suitable, handsome, and durable monument, the expense to be met and provided from the surplus property that should remain after payment of the above legacies and bequests. After this he gave the remainder of his property in charity. It was held, that the direction as to the monument was not a charge upon the residue, but a bequest of such integral part of the residue as would be necessary for carrying the direction into effect; and that, if that direction was void, it would not invalidate the bequest of the residue, inasmuch as the sum requisite for carrying that direction into effect was capable of being ascertained.

⁴⁴ *Boyce v. Boyce*, 16 Sim. 476. Sir *L. Shadwell* said: "It was only a gift of the houses that should remain, *provided*" the other daughter "should choose one of them;" and, as that election had failed, the gift must also fail. It would seem not a very unnatural construction in such a case that the devisee should take all the houses, and not very different from some cases already stated, — ante, pl. 15, and cases cited et seq., post, pl. 33.

⁴⁵ *Chapman v. Brown*, 6 Vesey, 404; *Attorney-General v. Hinxman*, 2 J. & W. 270; *Limbrey v. Gurr*, Madd. & Geld. 151.

⁴⁶ *Mitford v. Reynolds*, 1 Phill. C. C. 185. It seems finally to have been held, that the expense of the monument was a mere charge upon the residue, and if it failed it sunk into that residue, and only went to increase the amount; which is only in confirmation of the general rule upon the subject, that the residuary clause will carry, not only what the testator intends to have pass by it, but also all of the estate which was not in fact well disposed of. Sir *L. Shadwell*, Vice-Chancellor, in *Mitford v. Reynolds*, 16 Sim. 105.

29. And where the testator directed his trustees to expend the residue of money arising from the sale of land in building such a monument to his memory as they should think fit, and in building an organ-gallery in the parish church, Lord *Langdale* referred it to a master to ascertain in what proportion the residue should be divided between those two objects.⁴⁷

30. And if the portion given by the testator is determined, it will not fail in consequence of the indeterminateness of other funds, which the testator desires to have made a part of the fund, to be created by the final disposition of the bequest; as where the testator bequeathed to his daughter a legacy of £10,000, with a recommendation, which was construed to have the legal effect of a direction, that the legacy, together with such sum as the husband might choose to invest on his part, should be settled for the benefit of the daughter and her children, it was held to have created * a trust for the children, and that the legacy would * 398 not lapse by the death of the daughter in the life of the testator.⁴⁸

31. There are some cases where uncertainty as to the subject-matter of the bequest will render it wholly void. But if the uncertainty arise from extrinsic evidence, as we have before seen, it may be removed in the same way. But where the uncertainty appears upon the face of the will itself, it cannot be removed by resort to extrinsic evidence to show what the testator intended. This distinction is very happily illustrated by two cases, which to the unprofessional mind would seem very nearly alike. Thus a bequest to the son or to the daughter of A. B. would seem definite upon the face of the will. But if it should appear that A. B. had more than one son or daughter, whichever term is used in the will, an uncertainty would arise which would be fatal to the will, unless it could be shown by extrinsic evidence, which is admissible for that purpose, which of the sons or daughters of A. B. was intended to be benefited by the testator's bequest.⁴⁹

32. But a bequest to one of the sons or one of the daughters of A. B. presents a case of ambiguity upon the face of the will; since it appears, by the very terms of the instrument, that the tes-

⁴⁷ *Adnam v. Cole*, 6 Beav. 353; *Reynolds v. Kortright*, 18 Beav. 417; *Cramp v. Playfoot*, 4 Kay & J. 479.

⁴⁸ *Ford v. Fowler*, 3 Beav. 146.

⁴⁹ *Ante*, pt. 1, § 41, pl. 15.

tator was conscious than A. B. had more than one son or daughter, and that he intended to benefit one of the number in particular, and had, unintentionally, omitted to designate which particular one.⁵⁰ But, in many cases having this apparent character upon the face of the will, an escape out of the uncertainty, entirely satisfactory to the mind, may be found, in applying the words to the subject-matter by the aid of such extrinsic circumstances as are entirely admissible. Thus where the testator devised to several for life, and, after the death of the surviving tenant for life, to a son of my nephew A., and his heirs and assigns, it was held that this was a gift in fee to the first-born son of A. living at the time the estate vested, there having been two sons by a prior marriage, both of whom deceased many years before the estate vested.⁵¹

⁵⁰ 1 Jarman (ed. 1861), 341, 342; *Strode v. Lady Falkland*, 3 Ch. Rep. 183; 2 Vernon, 624, 625; T. Ray. 82.

⁵¹ *Ashburner v. Wilson*, 17 Sim. 204. And upon the same principle of uncertainty, a bequest to twenty of the poorest of the testator's kindred has been held void, on the ground of uncertainty as to who may be adjudged the poorest *Webb's Case*, 1 Roll. Ab. 609. But at the present day the mere uncertainty of the persons, until they were ascertained, is no ground of avoiding the will. All facts, to be ascertained by external proof, as all the inhabitants within one mile of a church, until ascertained, are uncertain. But if the will point out any practicable mode of removing the uncertainty, it will not fail, that being regarded as sufficiently certain which is capable of being reduced to certainty by extrinsic proof. *Id certum est*, &c. But there are cases where a devise to the testator's brother and sister's family, he having two sisters who had families, and there being no evidence of his intention in that respect, has been held void for uncertainty. *Doe d. Hayter v. Joinville*, 3 East, 172; *Doe d. Smith v. Fleming*, 2 C., M. & R. 638. And where the testator made a bequest over, to "and among my nephews and nieces, John Parker and Nanny Parker," followed by a long blank, the testator having, at the time of his death, fourteen nephews and nieces in all, and it being uncertain whether he intended to include all, the court held the next of kin entitled to the fund. *Greig v. Martin*, 5 Jur. n. s. 329. And where the bequest was made for the benefit of such persons as should be in copartnership with the testatrix at the time of her decease, or to whom she might have disposed of her business, in such shares and proportions as her trustees might deem advisable, it was objected that the bequest was void for uncertainty. But it appearing that the testatrix, at the date of her will, was in partnership with certain persons, and that she disposed of her business to some of the partners, together with a certain other person, it was held by Lord *Langdale*, M. R., and affirmed by Lord *Cottenham*, Chancellor, that the persons to whom the testator disposed of her business were entitled to the property in such shares as the trustee should deem advisable. *Stubbs v. Sargon*, 2 Keen, 255; s. c. 3 My. & Cr. 507.

* 33. But where a gift is made to a class, with one excep- * 399
tion, that person not being named or capable of being ascer-
tained, the bequest is not thereby avoided, but takes effect in favor
of the whole class.⁵² And where a bequest is made to such of the
children of A., without defining the portion of the children intended
to be included, it was held that all took.⁵³ And a gift to the tes-
tator's aforesaid nephews and nieces, none being before named, was
held to include all.⁵⁴

* 34. And where the testator made a bequest to his exe- * 400
cutors of £1,000, for the benefit of the widows of J. S. and
T. D., "to be divided between them, share and share alike," to be
invested in the Bank of England "during the lives of the survi-
vors or survivor of them," and appointed two executors, and as
there were but two, either of the executors or the widows, it was
plain the word "survivors" could not apply to either of these
classes. The Master of the Rolls, Sir John *Leach*, said: "It is
impossible to put any rational construction upon the bequest: it
must, therefore, be considered as void for uncertainty."⁵⁵

35. Bequests to different persons, or classes, in the alternative,
as indicated by the particle *or*, will create an invincible uncertainty,
unless it can be removed by construction. This may sometimes be
done by holding, that in certain events, indicated in other portions
of the will, it was the testator's intention to have the different
persons or classes named take in succession; and sometimes the
word "or" has been read as equivalent to "and." But this
construction is much less frequently resorted to in the later cases
than formerly. We have explained this point of construction
elsewhere.⁵⁶

⁵² *Illingworth v. Cooke*, 9 Hare, 37. The Vice-Chancellor, *Turner*, said:
"I think that I must consider the testatrix as not having made up her mind
whether she would except any of her grandchildren, or which of them she
would except, from the benefit of her residuary bequest."

⁵³ *Hope v. Potter*, 3 Kay & J. 206.

⁵⁴ *Campbell v. Bouskell*, 27 Beav. 325. The grandchildren had been before
named; but the Master of the Rolls thought it more consistent to reject the
word "aforesaid," with reference to "nephews and nieces," than to construe
those terms as used by mistake for grandchildren. See also *Mason v. Bateson*,
26 Beav. 404; *Wood v. Ingersole*, 1 Bulst. 61; s. c. Cro. Jac. 260; *Hill &*
Baker's Case, cited in 1 Bulst. 63; *Hambledon v. Hambledon*, Cro. Eliz. 164.

⁵⁵ *Hoffman v. Hankey*, 3 My. & K. 376.

⁵⁶ Ante, pt. 1, § 35, pl. 16. See also *Beal v. Wyman*, Styles, 240; *Mar-*
wood v. Darrell, Lee's Cas. t. Hard. 91; *Lowndes v. Stone*, 4 Vesey, 649;

36. Uncertainty will sometimes arise by reference to extraneous facts not definite in themselves; as where the testator devised estates to the same uses as his *other* estates, and there were several other estates devised to different uses, and it being impossible to determine which of the other limitations they were to follow,

* 401 * they were regarded as undisposed of, and passed to the heir at law.⁵⁷

37. Questions have often arisen in regard to the validity of devises and grants to several persons in succession, in consequence of the difficulty of determining the order of the succession.⁵⁸ The obvious construction of such a devise, to several persons named in succession, is to hold them entitled in the order in which their names occur; and where the devise is to persons in a class, entitled by virtue of consanguinity to the testator, or to any other one, to allow them to take in the order of seniority.⁵⁹

Waite v. Templer, 2 Sim. 524. See also Prestwidge v. Groombridge, 6 Sim. 171, where the interest of the testatrix's residuary estate was directed to be applied in defraying the education of her nephews, George and Charles, and the principal in binding them apprentices at fourteen, or in enabling them to commence business at twenty-one; and in the event of the elder boys, George and Charles, both or either of them, being settled before this will comes in force, "I provide that the next boy, James or Henry, have the benefit, and so on." George and Charles survived the testatrix, but died before twenty-one. The residue was claimed by James, as being, in the event which had occurred, solely entitled; but the court held James and Henry entitled, it being the purpose of the testatrix to make a provision for two of the nephews; and if the provision failed as to one of them, that James should take his place; and if it failed as to both, then James and Henry should take their places.

⁵⁷ Leslie v. Devonshire, 2 Br. C. C. 187. And where the testator uses technical words without fully comprehending their force, they may be construed according to a general popular apprehension, although not their precise legal force; as where the testator directed the residue of his real and personal estate, after the death or marriage of his widow, "to be divided according to the statute of distributions in that case made and provided," it was considered that the real estate would go to the heir, and the personal estate under the statute of distributions; and that the testator had not in mind any distinction in the statutory disposition of real and personal estate, but desired both to pass, the same as if there had been no will. Thomas v. Thomas, 3 B. & Cr. 825. The court finally held that only the personal estate passed under the will according to the statute of distributions; and that the real estate did not pass, but went to the heir at law; which was the same, in effect, as if neither passed.

⁵⁸ Windsmore v. Hobart, Hob. 313 b.

⁵⁹ 1 Jarman (ed. 1861), 345, 346; Ongley v. Peale, 2 Ld. Raym. 1312; 2 Eq.

38. It is well settled that charitable legacies will not fail in consequence of the indefiniteness of the object; and where there are two charities of the same name, the legacy will be divided between them, if it cannot be determined which was intended.⁶⁰ But * a gift to each of two objects in the same * 402 will, where one of them does not exist, will fail,⁶¹ notwithstanding the gift might have gone to the other object, if there had been but one.

39. We have before alluded to the general subject of uncertainty in devises and bequests, growing out of what is technically called *falsa demonstratio*, where one or more incident in the description of a thing is not precisely accurate, so as to afford, in that particular, a counterfeit presentment. Such a defect will not defeat the bequest, provided there remains sufficient to make a satisfactory identification of the subject-matter intended.⁶² The illustrations of this rule are almost infinite; but it would be of no great benefit to enumerate them, since they are not decided upon any uniform rule of construction. It often happens, that the false portion of the description contradicts some other portion of the same, so that both cannot stand together; as where land is described as being situated in a particular town or county, and in the occupation of

Cas. Ab. 358, pl. 8; *Young v. Sheppard*, 10 Beav. 207. And the consideration, that, in such case, some condition, or restriction upon the right of enjoyment, is attached to the devise, as that the several persons shall not be entitled to enter upon the subject-matter of the devise until one month after marriage, will not affect the order of succession, or entitle a younger member of the series, who first complies with such qualification, to the right to precede an elder one who has not complied. *Ongley v. Peale*, supra. It might be different if the vesting of the estate had been made dependent upon the condition affecting the enjoyment. See also *Thomason v. Moses*, 5 Beav. 77, where a devise was held void for uncertainty, in not determining what is meant by a devise to two persons in succession, and after their decease to be continued to the testator's next nearest heir, neither of the persons before named being heir of the testator. See also *Powell v. Davies*, 1 Beav. 532; *Ashburner v. Wilson*, 17 Sim. 204.

⁶⁰ *Waller v. Childs*, Amb. 524; *Bennett v. Hayter*, 2 Beav. 81. But see *Simon v. Barber*, 5 Russ. 112. Post, pl. 51.

⁶¹ *Lee v. Pain*, 4 Hare, 254. See also *Hare v. Cartridge*, 13 Sim. 165; *Ellis v. Bartrum*, 25 Beav. 109.

⁶² *Howard v. Conway*, 1 Coll. C. C. 87; *Stephens v. Powys*, 1 DeG. & J. 24. This point was determined at a very early day. *Blague v. Gold*, Cro. Car. 447, 473; *Thomson v. Thornton*, Ander. 188; *Chamberlaine v. Turner*, Cro. Car. 129. Ante, pt. 1, § 41.

a particular person, when such person is in the occupation of an estate lying partly in that town or county, and partly in another. It has been common in such cases to reject the reference to the town or county, and allow the whole estate to pass, on the ground that the testator would be more likely to mistake the town or county than to have described the devise as including the whole of the estate in the occupancy of a particular person, when he intended to include but a portion of it.⁶³

* 403 * 40. And the same general rule will apply to the description of the objects of a bequest. If any particular of the description is repugnant to other portions or to existing facts, it may be rejected, where the remaining portions of the description leave no doubt in regard to the identity of the person intended; as where there is a mistake in the corporate name of a corporation, the words "town council" being used for "commonalty."⁶⁴

⁶³ *Hastead v. Searle*, 1 Ld. Raym. 728; *Owens v. Bean*, Finch, 395; *Brown v. Longley*, 2 Eq. Cas. Ab. 416, pl. 14. And, as we have seen, where the devise described the land as in the *parish* of Byrling, and in a street called Brook street, the testator having no lands in that parish, but having lands in Byrling street, in another parish, they were held to pass under the devise. 1 Brownl. 131; 8 Vin. Ab. 277, pl. 7. And, as before stated, where landed estate is devised as freehold, the testator having no freehold estate, the leasehold estate will pass under the devise. *Denn d. Wilkins v. Kemeys*, 9 East, 366; and vice versa. *Day v. Trig*, 1 P. Wms. 286; *Doe d. Dunning v. Ld. Cranstoun*, 7 M. & W. 1. And where houses were devised as upon a particular street, the testator having none upon that street, but having them upon a lane opening into that street, they were held to pass. *Doe d. Humphreys v. Roberts*, 5 B. & Ald. 407. See also, on this question of the extent of a street, *Baddeley v. Gingell*, 1 Exch. 319; ante, pt. 1, § 41, pl. 15, where many of these cases are stated.

⁶⁴ *Attorney-General v. Corporation of Rye*, 7 Taunt. 546; *Foster v. Walter*, Cro. Eliz. 106; 2 Leon. 165. Any misdescription in the name of a corporation may be corrected by intendment and construction, when it can fairly be made out what particular corporation was intended, provided there be not some other corporation more nearly answering the words of the bequest than the particular one intended. If so, the corporation described will take, to the exclusion of the one intended. *Tucker v. Seaman's Aid Society*, 7 Met. 188.

The description of a corporation, together with the object intended, may be so indefinite, that the court cannot carry it into effect. *Attorney-General v. Sibthorp*, 2 Russ. & My. 107. But in general no such obstacles have been permitted to defeat the purpose of the testator. *Queen's College v. Sutton*, 12 Sim. 521; *Bradshaw v. Thompson*, 2 Y. & C. C. C. 295; *Wilson v. Squire*, 1 Y. & C. C. C. 654; *Smith v. Ruger*, 5 Jur. n. s. 905; ante, pt. 1, § 41, n. 24-26.

41. As a general rule, where the name of the person is mistaken in important and essential particulars, which are not supplied by description, the bequest will fail; and it must of necessity always fail, where the name of some other person is used by mistake. And where persons are correctly named, any amount of false description will be rejected as surplusage; as where two devisees correctly named are described as the legitimate children of A., when, in fact, by the establishment of a prior marriage of A., they were declared to be illegitimate, the devise is nevertheless valid.⁶⁵

* 42. But when it is made certain that part of the name * 404 of the person intended has been omitted, as where John Pryce Newbolt is called John Newbolt, and described as the *second* son of his father, when he was in fact the *third* son, the certainty of the name used is sufficient to remove the uncertainty arising from the erroneous description.⁶⁶

43. And even where the name of the devisee is mistaken in some respect, if the description of the person is such as to identify him with legal certainty, the bequest will not fail on that account, as we have seen; as where a devise was made to William Pitcairne, eldest son of Charles Pitcairne, and the eldest son of Charles Pitcairne was named Andrew, the court, being of opinion, nevertheless, that the person was pointed out with certainty, gave judgment accordingly.⁶⁷ There are many analogous cases to be found in the reports.⁶⁸

⁶⁵ *Standen v. Standen*, 2 Ves. Jr. 589; *Giles v. Giles*, 1 Keen, 685; *Ford v. Battey*, 23 L. J. Ch. N. s. 225; *Pratt v. Mathew*, 22 Beav. 334. And even a great degree of certainty will not induce the courts to give a devise to one named to another person described, but not named. *Del Mare v. Rebello*, 3 Br. Ch. Cas. 446; *Holmes v. Custance*, 12 Vesey, 279; *Daubeny v. Coghlan*, 12 Sim. 507; *Hodgson v. Clarke*, 1 Gif. 139. The last case was, however, reversed on appeal. See also *Newbolt v. Pryce*, 14 Sim. 354; *Bernasconi v. Atkinson*, 10 Hare, 345. But a mistake in the corporate name of a parish, if the person intended is clearly described, will not defeat a bequest; as where the devisees were called by their popular name, "The South Parish in S.," the legal name being First Parish in S. *First Parish in Sutton v. Cole*, 3 Pick. 232. Nor is a devise to the persons who at the time constituted a voluntary association void for uncertainty: they will take in their individual capacity. *Bartlet v. King*, 12 Mass. 537.

⁶⁶ *Newbolt v. Pryce*, 14 Sim. 354.

⁶⁷ *Pitcairne v. Brase*, Finch, 403; *Gynes v. Kemsley*, 1 Freem. 293; *Rivers' Case*, 1 Atk. 410; ante, pt. 1, § 41, n. 29.

⁶⁸ *Dowset v. Sweet*, Amb. 175; *Parsons v. Parsons*, 1 Ves. Jr. 266; *Smith v. Coney*, 6 Vesey, 42; *In re Feltham's Trusts*, 1 Kay & J. 528.

44. And even where, in a devise to six grandchildren, the name of one was omitted, and that of another inserted twice, it has been held that the person whose name was omitted shall take the share given to the name repeated.⁶⁹ And where the testator gave to his *namesake*, Thomas Stockdale, the second son of his brother John Stockdale, there being no son of his brother of the name of Thomas, it was held the second son should take the bequest.⁷⁰

45. And there have been cases where the person precisely answering the name in the will has been rejected, and the bequest given to another, imperfectly answering the name, but evidently intended; as upon a gift to Clare Hannah, the wife of A., whose wife was named Hannah, but who had an infant daughter named

Clare Hannah, it was held the wife was clearly entitled, as * 405 it was * impossible to suppose the testator could have called an infant daughter a wife.⁷¹ And in one case, where the testator, after a gift to four children of my cousin A., made a gift to the remaining three children of "my uncle A.," it appearing that the cousin at the time had seven children, and the uncle three grandchildren, one of the uncle's grandchildren having deceased, it was regarded as a gift to the "*remaining*" three children of the cousin, notwithstanding the will named three children of the uncle, who might in some sense be regarded as represented by the three *remaining* grandchildren of the uncle.⁷²

46. In a late case⁷³ in the House of Lords, it was held that where the testator devised an estate for life to his "sister Mary Frances Tyrwhitt Drake," he having no sister, but a sister-in-law of that name, and, after other devises, gave the residue to certain persons named, and among the number one was described as "my

⁶⁹ Garth v. Meyrick, 1 Bro. C. C. 30.

⁷⁰ Stockdale v. Bushby, G. Cooper, 229; 19 Vesey, 381; Doe d. Cook v. Danvers, 7 East, 299. In this last case the devise was to Mary Cook, wife of — Cook; and a married woman of the name of Elizabeth Cook was allowed to take, it appearing the testator had no other relative of that name, and that she was the person intended.

⁷¹ Adams v. Jones, 9 Hare, 485.

⁷² Bristow v. Bristow, 5 Beav. 291. This case may be regarded as somewhat in conflict with the general current of the English decisions. It sounds more like an American case, where the obvious justice of the particular case had served to obscure the general principle of law upon which the case might have been decided.

⁷³ Drake v. Drake, 8 Ho. Lds. Cas. 172.

niece Mary Frances Tyrwhitt Drake," the testator having no niece who bore that whole name, but nieces who bore one or other of the names, it was held that this portion of the bequest was void for uncertainty.

47. And where the testator made provision in his will for all the children of his brother Joseph "except the oldest son Thomas," and it was shown by extrinsic evidence that the oldest son of his brother Joseph, to the knowledge of the testator at the time of making his will, was possessed of a large fortune, but that it was the youngest son, who was named "Thomas," who with the other children, except the oldest, was unprovided for, it was held that the eldest son, and not Thomas, was the one intended to be excepted.⁷⁴

48. The rule in regard to what degree of uncertainty will render a will or a devise void is much the same in the American courts, which we have deduced from the English cases. Thus it was said in *Townsend v. Downer*⁷⁵ that a devise is never * de- * 406 clared void upon the mere ground that the description of the subject-matter is indefinite; but only when, after resort to oral proof, it still remains mere matter of conjecture what was intended by the instrument. The will must be incapable of any clear meaning. It is not enough that it is obscure, or that its apparent import is absurd.⁷⁶

49. We have already seen⁷⁷ that where the description of the legatee is erroneous, or the name defective, or mistaken, to any extent, it will not defeat the bequest, if the person, whether natural or corporate, is so far identified, either by the name or description, that there is no difficulty in determining the intent of the testator. The words, "members of my family," have been held sufficiently definite.⁷⁸

⁷⁴ *Hodgson v. Clarke*, 1 DeG., F. & J. 394.

⁷⁵ 23 Vt. 225.

⁷⁶ *Wootton v. Redd*, 12 Grattan, 196. But it is not enough to invalidate a will for uncertainty that all the particulars which the testator has specified in the will, as descriptive of the subject or object of a devise, cannot be made to harmonize with extrinsic facts, or in any way to apply to what is indicated by the other portions of the description. *Drew v. Drew*, 8 Foster, 489; *Hammond v. Ridgely*, 5 Har. & J. 245; *Woods v. Woods*, 2 Jones, Eq. 420.

⁷⁷ Ante, pt. 1, § 40.

⁷⁸ *Hill v. Bowman*, 7 Leigh, 650; *Douglas v. Blackford*, 7 Md. 8. But see *Janey v. Latane*, 4 Leigh, 327, where the devise was held void.

50. The question of uncertainty in regard to wills or other instruments has been allowed to have so small an influence in the decisions of the American courts, that there is no general course of decision in regard to the matter. The rule, if any can fairly be said to be established, is what has already been declared and repeated in different forms, that it must become mere guess or conjecture, after all the aids derivable from extrinsic evidence, what the testator did mean. And this is a dilemma, which, with our proverbial fertility in expedients, will very seldom occur. And we are glad to believe that the English courts are coming more and more upon this ground, and that it is the true ground in regard to this subject.⁷⁹ The rule declared, in the case last cited, was, that a mere misdescription of the legatee does not render the legacy void, unless the ambiguity is such as to render it impossible, either from the will or otherwise, to ascertain who was intended as the object of the testator's bounty.

51. In the late case of *Treat's Appeal from Probate*,⁸⁰
 * 407 the * testator left his whole estate to three persons by name, and to their successors for ever, with power to continue such succession by appointment so long as they, their survivors and successors, should judge the objects of the bequest required, in trust for the promotion of education among the Indian and African children, and youth of the United States or elsewhere, as in their judgment they shall deem best. "I leave it entirely with them to decide in what manner to expend the bequest to secure this object, either by using the principal for the education of a number of youth, and thus prepare them for immediate usefulness; or to use only the annual interest, and educate a smaller number, and thus continue; or if they shall judge it best, let them use the whole amount, and establish an academy, to be a lasting benefit to that class of my fellow-men for whose benefit I have given all my property, wishing it to be used in that way, time, and place which they shall judge best, after due consideration upon the condition that the people of color shall be in, in the United States, at the time that this bequest shall be at their disposal." Held, that the bequest was not void for uncertainty, either as to the beneficiaries of the charity, or as to the mode of carrying the charity into effect.

⁷⁹ *Smith v. Smith*, 4 Paige, 271; s. c. 1 Edw. Ch. 189; *Bull v. Bull*, 8 Conn. 47.

⁸⁰ 30 Conn. 113. See also *Piercy v. Piercy*, 19 Ind. 467.

52. It seems to be settled that a bequest to each of a class will carry the sum to every member, notwithstanding an error in stating the number. Thus a bequest of £500 to G. E. S., and £250 to each of his *two* children, there being *three*, will embrace the whole number.⁸¹ This case is decided upon the authority of *Garvey v. Hibbert*,⁸² and seems to be nearly identical with it. And the circumstance that the testator knew the number of the children, or that it largely exceeded the number named, will not affect the application of the rule. Thus where the bequest was to the *three* children of my niece £500 each, and there were *nine* children, it was held that each was entitled to a legacy of £500.⁸³

SECTION II.

DEGREE OF CERTAINTY REQUIRED TO CREATE VALID TRUSTS.

1. Where a trust is created for the benefit of objects to be selected by the trustee, it is void for uncertainty.
2. But where the general purpose is pointed out, the court may carry it into effect.
3. To create a binding trust, the words must be imperative, and the object and subject both certain.
4. Where either the object or subject of a trust cannot be ascertained, the trust fails.
5. And where it appears that the object was defined in some way not known, it will fail.
6. Mere recommendation creates trust, if the subject and object are clearly defined.
7. Courts of equity will aid trustees in carrying their duties into effect, but will not absolutely control them.
 - a. Where a power is connected with a trust, the court will enforce its execution.
 - b. Courts of equity will aid the trustees by removing obstructions.
8. Decisions in regard to trusts constantly varying, and early decisions not always reliable.
- * 9. Precatory words sufficient, where the intent is clear, to create a * 408 beneficial interest.
- n. 14. Digest of numerous cases upon this point.

⁸¹ *Spencer v. Ward*, L. R. 9 Eq. 507.

⁸² 19 Vesey, 125.

⁸³ *Daniell v. Daniell*, 3 DeG. & Sm. 337. See *Willoughby v. Storer*, 18 W. R. 658, where the court seized upon general words to save a bequest, where the same was evidently defective.

10. The real question in such cases always is, whether testator intended to control the trustee.
11. But there are many exceptional cases, where words of desire have been held obligatory.
12. The proper course seems to be, to follow the natural import of the words.
13. Money given absolutely to the legatee, but for a special purpose.
14. If the trustee has an absolute discretion, it will control the title of *cestuis que trust*.
15. But where others besides the donee are interested, courts will interfere.
 - a. If the donee is a mere trustee, without interest, he is compellable to act.
 - b. Where the donee has a joint-interest with others, he may also be compelled to act.
 - c. Cases where the gift is absolute, and the wish of the testator expresses merely his motive.
- n. 50. Cases where the gift is to those owing a legal obligation to perform the duty expressed.
- n. 51. Cases where there was only a moral or no obligation before.
 - d. The whole subject of trusts created by precatory words rests on no sound basis.
 - e. Recommendations in favor of tenants, agents, and stewards, enforced in courts of equity.
 - f. But this rule is shaken, if not overruled, in *Lawless v. Shaw*.
 - g. Some of the American cases seem to favor the same view, as *Lawless v. Shaw*.
 - h. The late English cases manifest the same inclination.
 - i. Trustees having a discretion, under control of courts of equity, if they abuse it.
 - k. Decision of United States Supreme Court upon the question.
 - l. Mr. Justice *McLean's* opinion upon the point.
 - m. Early case in Connecticut.
 - n. Subject further considered, and rule more definitely established.
 - o, and n. 68. Cases in Vermont and other states.
16. Bequest to mother and children held not to embrace issue of deceased child.
17. Trust in personality denied.

§ 25. 1. WHERE a person indorsed a promissory note for £2,000, and sent it by letter to another, giving it to her for her sole use and benefit, for the express purpose of enabling her to present to either branch of the donor's family any portion of the principal or interest thereon, as she might consider most prudent, and, in the event of the death of the donee, empowered her to dispose of the fund by will or deed to those of either branch of the family she might consider most deserving thereof, it was held that this letter created a trust, the objects of which were too undefined to enable the court to execute it, and that the £2,000 formed part of the donee's general personal estate.¹

¹ *Stubbs v. Sargon*, 2 Keen, 255. This case was affirmed, 3 My. & Cr. 507.
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* 2. And a gift to trustees of a fund to be expended in private charity is too indefinite to enable the court to carry it into effect. A trust, to be carried into execution in equity, must be of such a nature that it can be under the control of the court. And if the trust be ineffectually created out of personalty, the fund will go to the next of kin.² It is here said, if any particular object, as the erection of a school, or even a general object more indefinite than that, be pointed out, so that the court can see what the purpose is, the court will execute the trust, although the object pointed out may fail. But the cases upon which the court has interfered on the ground of trust are here distinguished from those in which a direct charity has been pointed out. And where a trust was created for general charity by the words, "If there is money left unemployed, I desire it may be given in charity," the bequest will be upheld, and carried into effect.³

3. Lord *Langdale* has thus defined⁴ the degree of certainty required to create a valid trust: "Any words by which it is expressed, or from which it may be implied, that the first taker may apply any part of the subject to his own use, are held to prevent the subject of the gift from being considered certain. And a vague description of the object, that is, a description by which the giver neither clearly defines the object himself, nor names a distinct class out of which the first taker is to select, or which leaves it doubtful what interest the object, or class of objects, is to take, will prevent the objects from being certain within the meaning of the rule. And in such cases, we are told,⁵ the question "never turns upon the grammatical import of the words. . . . I must consider the subject-matter, the situation of the parties, and what is the probable intention." And in another case⁶ it is said, that, to create a trust by means of an obligation imposed upon the conscience of the devisee, the words must be imperative, the subject must be certain, and the object as certain as the subject.

4. A writer of great learning and accuracy,⁷ in discussing this point, says: "Courts of equity carry trusts into effect only

² *Ommanney v. Butcher*, Turn. & Russ. 260.

³ *Legge v. Asgill*, Turn. & Russ. 265, in note.

⁴ *Knight v. Knight*, 3 Beav. 148, 174.

⁵ *Meggison v. Moore*, 2 Ves. Jr. 630, 632, 633.

⁶ *Wright v. Atkyns*, Turn. & Russ. 143; *Bristol v. Austin*, 40 Conn. 438.

⁷ 2 Story, Eq. Jur. § 979 a; *Wheeler v. Smith*, 9 How. (U. S.) 55, 79;

* 410 when * they are of a certain and definite character. If, therefore, a trust be clearly created in a party, but the terms by which it is created are so vague and indefinite that courts of equity cannot clearly ascertain either its objects or the persons who are to take, then the trust will be held entirely to fail, and the property will fall into the general funds of the author of the trust."

5. And it has been held, that where a legacy is given to an individual, for a purpose expressed or to be expressed, in some other paper referred to, and for some unexplained cause that purpose is not known to the court, it creates such an uncertainty that a court of equity cannot, by construction merely, declare the intention of the testator ;⁸ that this case, where, from the very terms of the will, there is an obvious cause for the uncertainty, namely, the absence of the paper wherein the testator had made the purposed declaration of intention, makes it essentially different from the ordinary case, where the court have before them all which the author of the trust intended to say in order to create it.

6. A great deal of discussion has arisen in the courts of equity in regard to the force of words of recommendation in wills in regard to the use to which the testators might desire the persons, to

Morice v. Bishop of Durham, 10 Vesey, 521. In this last case, Lord *Eldon* said: "If a testator expressly says he gives upon trust, and says no more, it has long been established that the next of kin will take. Then, if he proceeds to express the trust, but does not sufficiently express it, or expresses a trust that cannot be executed, it is exactly the same as if he had said he gave upon trust, and stopped there; as in *The Bishop of Cloyne v. Young*, 2 Vesey, Sen. 91. In *Pierson v. Garnet*, 2 Br. C. C. 38, 226, and the other cases of that sort, the question was, whether the testator had said he gave upon trust, and the decision was that he had, as the object and the subject were sufficiently described." See also *Ford v. Fowler*, 3 Beavan, 146 ; *Harland v. Trigg*, 1 Br. C. C. 142 ; *Robinson v. Waddelow*, 8 Sim. 134.

⁸ *Gloucester v. Wood*, 3 Hare, 131. This case was affirmed in the House of Lords. 1 Ho. Lds. Cas. 272. See also *Briggs v. Penny*, 3 DeGex & Sm. 525 ; 3 Macn. & G. 546. Where the gift implies no object at all, but merely that the donee shall dispose of it, the gift is considered absolute in him. *Gibbs v. Rumsey*, 2 V. & B. 294. And a bequest to three persons, as tenants in common, subject to any disposition the testator might thereafter make by deed or writing duly executed, and none being made, it was held, the donees took an absolute interest. *Fenton v. Hankins*, 9 W. Reporter, 300. But if the gift be clearly in trust, and the trust fail for uncertainty, the property, being personal, goes to the next of kin. *Fowler v. Garlike*, 1 R. & My. 232.

whom they had given legacies, to put the same; and how far * merely precatory words, or words of wish or desire, * 411 would have the effect to create an obligatory trust. But it seems to have been adopted as a rule of the courts of equity, at one time certainly, that no particular form of expression is requisite in order to create a binding and valid trust; and that words of recommendation, request, entreaty, wish, or expectation, will impose a binding duty upon the devisee by way of trust, provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the object of the trust.⁹

7. The courts of equity, although not possessing the power, either to control or to exercise a discretion vested absolutely in trustees, will, nevertheless, define certain limits, beyond which the discre-

⁹ *Reeves v. Baker*, 18 Beav. 372; *Macnab v. Whitbread*, 17 Beav. 299; 1 *Jarman* (ed. 1861), 336. The cases upon this point are very numerous, and have been decided mainly upon the particular facts and circumstances of each case. The question arose in *Gilbert v. Chapin*, 19 Conn. 342, and was discussed very much at length, the court being divided. It was there held by the majority of the judges, that a devise to the testator's widow, to her and her heirs for ever, recommending to her to give the same to my children, created a fee-simple in the first grantee. Mr. Chief Justice *Church*, who gave the opinion of the court, recognized the rule that precatory words are sufficient, according to the decisions of the English courts, to create a trust, but claimed that the rule had led the English courts to disregard the real intent of the testators, in the majority of the cases; and that the American courts have not established any settled rule upon the point; and that they were, therefore, at liberty to follow what they esteemed the actual intent. In the recent case of *Warner v. Bates*, 98 Mass. 274, where the testatrix, having an estate secured to her separate use, and having also three children by a former husband, two sons and a daughter, married again, and had issue, another daughter, and until her death, twenty-five years after the last marriage, lived with these children and her husband in her house, the family being mainly supported by her income and his management and care, and by her will gave half her estate to her sons and half to her daughters by way of trust, using apt and technical words in defining the same, and gave also to her husband the use and income of the whole estate for life, "in the full confidence that he will, as he has formerly done, continue to give and afford to my children such protection, comfort, and support as they or any of them may stand in need of," it was held to create a trust in favor of the children, enforceable in a court of equity. And in *Reed v. Reed*, 30 Ind. 313, a bequest of \$200 to the testator's son, "which said \$200 it is my wish that my son shall add to the advancement he shall make to his son R. when he comes of age," was held to create a trust for the benefit of the latter, whether his father made any advancement to him or not.

tion of the trustees cannot extend, and, where there is an entire failure to perform the duty on the part of the trustee, will adopt such general rules of construction as will enable them to * 412 attain the * nearest approximation to the purpose of the intended trust; as where certain trusts were declared for the benefit of adults and infants, with the power to revoke these uses and declare others with the consent of the trustees and the cestuis que trustent, it was held that a revocation of the uses for the purpose of creating a mortgage of the estate was not within the discretion thus given, and that a discretion, vested in trustees of a settlement, must be exercised in such a way as to preserve, not to defeat, the objects of the settlement.¹⁰ But where the trustees have a legitimate discretion, the most the courts have seemed inclined to do in the matter is: —

a. To ascertain whether the trustees have abandoned the trust; and, if they have done so, to make an equal distribution among the objects coming within the range of the discretion of the trustees.¹¹ There is, however, a distinction between a mere power and a trust. The failure to execute the former, for any cause (not the defective execution, but the entire failure to attempt the execution), wholly defeats all beneficial interest under it, and the court cannot supply the defect. But where the power is connected with a duty or obligation to execute it for the benefit of others, the donee of the power becomes a trustee for the execution of it, and has no discretion whether he will exercise it or not; and the courts of equity will not permit the failure of the trustee to exercise such power or discretion, through negligence, accident, or other circumstances, to disappoint the interest of those for whose benefit the exercise of the trust was committed to the trustee.¹²

¹⁰ *Eland v. Baker*, 7 Jur. N. S. 956. See also *Howard v. Ducane*, Turn. & Russ. 81; *In re Wilkes's Charity*, 3 Mac. & Gor. 440.

¹¹ *Wain v. Earl of Egmont*, 3 My. & K. 445. The Master of the Rolls here said: "The petitioners must first submit those claims to the investigation and allowance of the trustees; and, if the trustees refuse to enter into that investigation, they will then be justified in an application to the court."

¹² *Brown v. Higgs*, 8 Vesey, 561; s. c. 4 Vesey, 708, and note. It has been said, that where the donor expresses a general intention in favor of a whole class, and a particular intention in favor of such of the class as the trustee may select, and the selection fails to be made, thus defeating the particular intent, the court will carry into effect the general intent, and distribute the fund equally among the entire class. *Burrough v. Philcox*, 5 My. & Cr. 73,

* b. To aid the trustees in the execution of their power, * 413 and to remove any obstructions thrown in their way by means of the uncertainty of the discretion intrusted to them, or in any other mode. And it has been very recently decided, that an application to the courts for aid in carrying out the trust by the trustees is no ground of inference that the trustees disclaim, or intend to relinquish their discretion.¹³

8. Questions have very often arisen in regard to what was claimed, on the one hand, as the creation of a trust, and, on the other, as an absolute gift to the donee ; and the interference of the courts has been demanded in order to determine rights dependent upon these adversary claims. It will scarcely be required that we refer in detail to the cases upon this point. They will be found in many of the elementary treatises, but will scarcely repay the labor of careful revision; since the doctrine of the early cases is constantly disregarded ; and no one feels any confidence in relying upon any decision in regard to trusts, unless it has been very recently made, or else many times recognized, in the later decisions of the courts.¹⁴

92. See also *Brown v. Higgs*, 5 Vesey, 495 ; *Harding v. Glyn*, 1 Atk. 469 ; *Duke of Marlborough v. Lord Godolphin*, 2 Vesey, Sen. 61 ; *Witts v. Boddington*, 3 Br. C. C. 95. But in the opinion of Lord *Alvanley*, M. R., in *Brown v. Higgs*, 5 Vesey, 499 et seq., the cases are carefully reviewed, and many of them corrected by reference to the Registrar's Book, and the proper distinction between a mere power and a power connected with a trust carefully pointed out. This question is examined and the leading authorities quoted in an able opinion of Sir *W. Page Wood*, Vice-Chancellor, in *Joel v. Mills*, 7 Jur. N. S. 389. And the same principle is maintained in *Little v. Neil*, 10 W. Reporter, 592, by V. C. *Kindersley*. The will of the trustee of the power will be construed as an appointment under the power, whenever it embraces all the requisites enumerated in the instrument creating the power. *Thornton v. Thornton*, L. R. 20 Eq. 599.

¹³ *Joel v. Mills*, 7 Jur. N. S. 389.

¹⁴ In *Massey v. Sherman*, Amb. 520, s. c. nom. *Macey v. Shurmer*, 1 Atk. 389, the testator devised copyholds to his wife, not doubting she would dispose of the same to and amongst his children as she should please; and it was held to create a trust for the children, as the wife should appoint. And the bequest, with a "dying request," that, if the devisee should die without issue living at his death, he shall dispose of the same amongst the descendants of a particular person "in such manner and proportion as he shall think proper," was held to create a valid trust for the persons named. *Pierson v. Garnet*, 2 Br. C. C. 38, 226. See also *Wynne v. Hawkins*, 1 Br. C. C. 179 ; *Parsons v. Baker*, 18 Vesey, 476 ; *Malone v. O'Connor*, 2 Ll. & Goold, temp. pl. 465 ;

* 414 * 9. This subject is very carefully examined, and the later cases somewhat discussed, in a recent case,¹⁵ by a judge of

Re O'Bierne, 1 J. & La T. 352. And a recommendation was held to create a valid trust. *Malim v. Keighley*, 2 Ves. Jr. 333, 529. See also *Paul v. Comp-ton*, 8 Vesey, 380; *Knott v. Cottee*, 2 Phill. C. C. 192; *Cholmondeley v. Cholmondeley*, 14 Sim. 590. But sometimes the word "recommend" has been held not to create a trust. *Meggison v. Moore*, 2 Ves. Jr. 630. And where the testator left one-third part of his estate "entirely at the disposal of my dear and loving wife, among such of her relations as she may think proper," and the wife died without making any such disposition, it was held that her next of kin were entitled to the fund. *Birch v. Wade*, 3 V. & B. 198. So an entreaty to leave the share of testator's estate, left to the person addressed, to the testator's children and grandchildren, was held to have created a contingent trust subject to the power of selection. *Prevost v. Clarke*, 2 Madd. 458. See also *Pilkington v. Boughey*, 12 Sim. 114. And the request that testator's wife, to whom he left an estate, together with another, to whom he left nothing, should superintend and take care of the education of his nephew, so as to fit him for any reputable employment, was held to create a trust in favor of the nephew, by which he was entitled to be educated and maintained out of the income of the property left to the widow, the remainder after her death being left to the nephew. *Foley v. Parry*, 2 My. & K. 138; s. c. 5 Sim. 138. And the expression, "I desire to give," creates a trust. *Mason v. Limbury*, cited in *Vernon v. Vernon*, Amb. 4. So also, "I hereby request." *Nowlan v. Nelligan*, 1 Br. C. C. 489. So of the word "confiding." *Griffiths v. Evan*, 5 Beav. 241. See *Brook v. Brook*, 3 Sm. & Gif. 280; *Alexander v. Alexander*, 2 Jur. n. s. 898. So also of the terms, "advised him to settle." *Parker v. Bolton*, 5 L. J. Ch. n. s. 98. "A last wish to daughters to give my granddaughter £1,000 also." *Hinxman v. Poynder*, 5 Sim. 546. "Require and entreat." *Taylor v. George*, 2 V. & B. 378. "Trusting that he will preserve the same, &c., so that it may go and be equally divided." *Baker v. Mosley*, 12 Jur. 740. "To apply the same." *Salisbury v. Denton*, 3 Kay & J. 529. And a direction to trustees to convey, so that the wish and desire of the testator may be observed, "which is hereby declared, that the other children may be allowed to participate," will create a valid trust. *Liddard v. Liddard*, 6 Jur. n. s. 439. There are many other cases where similar forms of expression are used. See *Cruwys v. Colman*, 9 Vesey, 319; *Webb v. Wools*, 2 Sim. n. s. 267.

¹⁵ *Bernard v. Minshull*, Johns. (Eng. Ch.) 287. See also *Bonser v. Kinnear*, 2 Gif. 195. But, if the gift be absolute in the first instance, subsequent precatory words will not cut it down to a mere trust. *Ib.* In *Eaton v. Watts*, Law Rep. 4 Eq. 151, it was held that a bequest of "all my property to my husband, hoping he will leave it, after his death, to my son if he is worthy of it," with the following explanation, — "My reason for leaving all I have to dispose of to my husband, and in his entire power, is that my son is already certain of a fortune, and that I cannot now feel any certainty what sort of character he may become; I therefore leave it to my husband, in whose honor, justice,

great learning * and experience, and some points rendered * 415 clear, which before seemed to be involved in a good deal of uncertainty. It would seem, from this case, that there is no essential difference between precatory words and any other form of expression, in regard to the necessity of having the subject and object of the devise clearly pointed out, in order to give such a form of bequest the force of creating a trust. All that is meant by the cases upon this point, is, that the subject and object intended,

and parental affection, I have the fullest confidence; if my son dies before my husband, although I leave all without reservation to my dear husband, to dispose of as he thinks fit, yet, should my son leave any children, I do not doubt it will go to them from him, knowing his steady principles and clear judgment of right and wrong, and his sense of justice," — did not create a trust. And in so doing the court seems to have adhered to the rule, that, when the absolute control is given to the legatee, no trust can result from any expression of wish, desire, or confidence of expectation, on the part of the testator, as to how such control will be exercised.

In the late case of *Wilson v. Bell*, 17 W. R. 944, s. c. L. R. 4 Ch. App. 581, the Court of Appeal held, reversing the decree of Vice-Chancellor *James*, where the testator gave the residue of his estate to his son, and directed that his daughter should reside with and be maintained by his son so long as she remained unmarried, that so long as the son was willing the daughter should reside in his house, she was not entitled to any maintenance unless she did reside with him. It was also here considered that the claim for maintenance did not extend beyond the life of the son. But a devise to the wife in fee, "relying on her doing what is right," was held too vague to create a trust. *Re Crockford's Estate*, 17 W. R. 1004. Where, however, the devise was absolute in the first instance, it was held that the same would be cut down to a mere trust by this provision, "I bequeath the same to A. B. absolutely, trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted;" it appearing that shortly before the date of the will the testator had expressed to the legatee a wish that she would apply certain sums to certain purposes, and, among others, to "place £500 in the hands of the cure of St. John's, at Orleans, for the purpose of keeping up the testator's family tomb at Orleans." It was held that the legatee took the bequest beneficially, but subject to the performance of the wishes communicated to her; and whether the direction as to the testator's tomb was void or not, there was no resulting trust for the benefit of the heirs at law. s. r. *Baillie v. Wallace*, 17 W. R. 221; *Irvine v. Sullivan*, 17 W. R. 1083; s. c. L. R. 8 Eq. 673; *Wood v. Cox*, 2 My. & Cr. 684, was here followed, and *Briggs v. Penny*, 3 DeG. & Sm. 525, distinguished from the present case. The expression, "well knowing her sense of justice and love of her family, and feeling perfect confidence that she will manage the same to the best advantage for the benefit of her family," was held not sufficient to create a precatory trust. *Greene v. Greene*, Ir. R. 3 Eq. 90.

being clearly pointed out, will aid the court in construing it a trust. But even where mere words of request or desire are used, if it is clear that a binding duty was intended to be imposed upon the trustee, it will be none the less a trust impressed upon the fund, because the subject or object of the trust is not clearly defined.¹⁵

10. The rule in regard to the effect of precatory words, in creating a binding trust, as stated by one learned judge, and adopted by another,¹⁶ is that "the real question in these * 416 cases * always is, whether the wish, or desire, or recommendation, that is expressed by the testator, is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion." And Sir *W. Page Wood*, Vice-Chancellor, in *Bernard v. Minshull*,¹⁶ argues, that the language of Lord *Truro*,¹⁷ in saying, that in all such cases, in order to constitute a trust, when the words used are merely precatory, a certain subject and a certain object are indispensable, was not intended to imply that the objects intended must appear with certainty to the court, but only that the testator had such objects in contemplation. And the learned judge concludes, that although the certainty of the subject and of the object may clearly indicate the existence of a trust, and so exclude the beneficial interest of the donee, and create a trust, the converse of this proposition is by no means true; and if it shall clearly appear that a trust was intended, however indefinite may be the subject or the object, it must, nevertheless, be so treated, notwithstanding the words used in its creation are merely precatory. And it was also held in this case, that where a trust was created, so as to exclude the donee, if the object of the trust were too indefinite to be carried into effect by the court, the fund must be carried into the residuum of the estate, notwithstanding the person entitled to the residuum

¹⁵ Lord *Cranworth*, V. C., in *Williams v. Williams*, 1 Sim. N. S. 358, and by Sir *W. Page Wood*, V. C., in *Bernard v. Minshull*, Johns. (Eng. Ch.) 276; S. P. *Van Duyne v. Van Duyne*, 1 McCarter, 397. The court here say, "In the absence of any adjudicated case, or settled rule of construction," in this state, the court "feel at liberty to adopt such rule of construction as seems best calculated to effectuate the intention of the testator."

¹⁷ *Briggs v. Penny*, 3 Macn. & Gor. 546.

is the same from whom this fund had been expressly excluded in the former portion of the will. And if a discretion is reposed in trustees, to apply funds committed to them to either of two objects, one of which is legal and the other not, the bequest is valid; the law rather presuming that the discretion will be so exercised, that the legal object shall have the preference.¹⁸ And a bequest to the wife of the testator, declaring that, although he had given all to his wife, it was, nevertheless, his desire, if his children conducted themselves to her approbation, that she should leave such property equally among them all, was held to create a trust in favor of the remaining children.¹⁹ But in a very recent case, where the * testator left all the residue of his property, real * 417 and personal, to his wife, with power to dispose of the same, among all or any of his children, in her discretion, it was held to be an absolute gift to the wife.²⁰ And it seems pretty generally settled, by a long succession of well-considered cases, that where the words of the will clearly indicate a disposition in the testator to give the entire interest, use, and benefit of the estate, absolutely, to the donee, it will not be restricted, or cut down to any less estate, by any words of expectation or desire, however strongly expressed, that the donee will dispose of the estate, or what remains unexpended at his decease, in any particular manner indicated in the will.²¹ And a recommendation to the donee, to dispose of the estate in a particular manner, will not affect with a trust for that purpose a donation, to be disposed of by the will of the donee in such way as she shall think proper.²² And, in the case of *Williams v. Williams*,²³ the testator bequeathed property to his wife, absolutely for her own use and benefit, and subsequently wrote her as follows: "I hope my will is so worded, that every thing

¹⁸ *Faversham v. Ryder*, 5 DeG., M. & G. 350.

¹⁹ *Bonser v. Kinnear*, 6 Jur. N. S. 882; 2 Giff. 195.

²⁰ *Howarth v. Dewell*, 6 Jur. N. S. 1360. The Master of the Rolls, Sir J. Romilly, said: "Those words are nothing more than a suggestion." — "They do not amount to a precatory trust." — "All the class of cases to which they belong contain estates for life; while here the gift is absolute, with superadded words." See also, upon this general subject, *Gully v. Cregoe*, 24 Beav. 185.

²¹ *Meredith v. Heneage*, 1 Sim. 542; *Wood v. Cox*, 1 Keen, 317; s. c. reversed by Lord *Cottenham*, 2 My. & Cr. 684; *Winch v. Brutton*, 14 Sim. 379; *Bardswell v. Bardswell*, 9 Sim. 319; *White v. Briggs*, 15 Sim. 33; *Fox v. Fox*, 27 Beav. 301.

²² *Johnson v. Rowlands*, 2 DeG. & Sm. 356.

²³ 1 Sim. N. S. 358. See also *Green v. Marsden*, 1 Drew. 646.

that is not in strict settlement you will find at your command. It is my wish that you should enjoy every thing in my power to give, using your judgment where to dispose of it amongst your children, when you can no longer enjoy it yourself; but I should be unhappy if I thought that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." It was held, by Lord *Cranworth*, V. C., that the words of the letter, which, as the law then was, operated as a codicil to the will, were not sufficient to reduce the absolute gift to the wife to a trust: but this opinion of the learned judge is based, to some extent, upon the difficulty of determining who were to be the cestuis que

trustent, if any trust was created; but more upon the fact,
* 418 that the testator intended what was said in the letter * as a mere expression of his preference or desire, at the same time leaving the entire disposition of the estate in the absolute disposal of the legatee. The general rule in this class of cases is here well stated by this able and experienced judge, which we have already quoted.²⁴ And the same rule of construction is adopted by Vice-Chancellor *Kindersley*.²⁵

11. But there are, it must be confessed, numerous cases in the books, where very indefinite expressions of mere wish or desire have been construed to create a trust in behalf of persons indicated. Where the gift was made to the wife of the testator, in as absolute terms as it is possible to conceive, with the addition of an expression of the testator's "full confidence that she would, in every respect, appropriate and apply the same unto and for the benefit of all his children," it was held that the widow took a life-estate, with a power of appointment among the children.²⁶ And there are

²⁴ Ante, in pl. 10.

²⁵ *Webb v. Wools*, 2 Sim. N. S. 267. The learned judge here said: "If I put on the latter [portion of the sentence] a construction which will have the effect of creating a trust for the benefit of the children, I shall make the two branches of the sentence contradictory." The cases bearing upon the question are here cited, and very extensively examined by the learned judge.

²⁶ *Ware v. Mallard*, 16 Jur. 492; *Brasher v. Marsh*, 15 Ohio, N. S. 103. And in the recent case of *Curnick v. Tucker*, L. R. 17 Eq. 320, where the testator appointed his wife sole executrix, and gave her all his property, landed and personal, of every description, for her sole use and benefit, in the full confidence that she would so dispose of it among all their children, during her lifetime and at her decease, doing equal justice to all of them, it was held that the wife took a life-interest, with a power of appointment among the children

many other cases where the forms of expression were not very dissimilar, and where it was held no trust was created; as where the testator gave all his estate to his wife, trusting that she would use it for the spiritual and temporal benefit of herself and children, remembering always the Church and the poor, it was held that the wife took absolutely.²⁷

12. It seems clear, that, where the expression of request or desire in the will is ever so strong, it will not be construed to create a trust for others, where the will contains an expression that the devisee is nevertheless to be free to act in his own discretion.²⁸ And it has always seemed to us that the proper construction in all * such cases was to follow the natural import of the * 419 words used. And this seems the inclination of the later cases.²⁹

13. It is well settled, that where the bequest is for any particular purpose or object defined in the will, if that has reference exclusively to the benefit of the donee, and the application of the money to that purpose is, by the terms of the will, left to the mere will and

as she might think fit. *s. p. Le Marchant v. Le Marchant*, 22 W. R. 839; L. R. 18 Eq. 414. A distinction is here taken between the power of disposal of the wife, embracing her lifetime and being limited to the time of her decease, and then restricted to the benefit of the children, which would seem to indicate pretty clearly that the disposition, at that time, of all that remained of the estate, was intended to be for the exclusive benefit of the children. A bequest of all testator's estate to his wife, for her own absolute use and benefit, "trusting she will do justice to any children we may have," creates no trust for the benefit of the children. *Ellis v. Ellis*, 23 W. R. 382.

²⁷ *Curtis v. Rippon*, 5 Madd. 434. In *Abraham v. Alman*, 1 Russ. 509, words strongly indicating an intention to provide for two of testator's grandchildren were held not to have that effect. See also *Sale v. Moore*, 1 Sim. 531; *Hoy v. Master*, 6 Sim. 568; *Lechmere v. Lavie*, 2 My. & K. 197; *Wynne v. Hawkins*, 1 Br. C. C. 179; *Horwood v. West*, 1 Sim. & Stu. 387.

²⁸ *Young v. Martin*, 2 Y. & C. C. C. 582. V. Ch. *Knight Bruce* here said: "I never knew such a question to be made, where the testator has stated, as he has stated here, that they are not to be considered as words of injunction." *Lambe v. Eames*, L. R. 10 Eq. 267; 6 Ch. 597.

²⁹ 1 *Jarman*, 363; *Bayne v. Crowther*, 20 Beav. 400. But where the income only of a fund is directed to be applied to the maintenance and support of the donee, at such times and in such proportions and in such manner as the trustees shall, in their discretion, think most expedient, and for no other purpose whatever, it was held that the donee's assignees in bankruptcy were not entitled to any portion of the provisions thus made. *Twopeny v. Peyton*, 10 Sim. 487.

good faith of such donee, courts of equity will not attempt to compel the application, according to the prescribed purpose. Thus, where money is given to purchase for the legatee a ring,⁸⁰ or an annuity,⁸¹ or a house,⁸² to set one up in business,⁸³ or for his maintenance and education,⁸⁴ or to bind him an apprentice, it was held to be an absolute gift, and not to create trusts for the particular use.⁸⁵ In an important case, where money was given for the board and education of an infant until he shall be fit to put out an apprentice, then a further sum as an apprentice fee for him, the legatee having become nineteen years of age, and not having been put out, it was held that he was entitled to the legacy.⁸⁶ And where the testator gave estates to trustees in trust to pay £300, annually, for the support of his son's children, during the life of their father, and the son had three children, who became of age, and then one of them died, it was held that the personal representatives of the deceased child were entitled to one-third of the provision * 420 during * the father's life.⁸⁷ Vice-Chancellor *Shadwell*, in *Noel v. Jones*,⁸⁷ states the general rule in this class of cases

⁸⁰ *Apreece v. Apreece*, 1 V. & B. 364.

⁸¹ *Dawson v. Hearn*, 1 Russ. & My. 606; *Ford v. Batley*, 17 Beav. 303; *Re Browne's Will*, 27 Beav. 324. And it makes no difference that the money is directed to be invested in purchasing an annuity: if the annuitant die immediately after the testator, her administrator shall have the money, producing the annuity, and the rents and profits which have already accrued. *Yates v. Compton*, 2 P. Wms. 308.

⁸² *Knox v. Hotham*, 15 Sim. 82.

⁸³ *Gough v. Bult*, 16 Sim. 45.

⁸⁴ *Webb v. Kelly*, 9 Sim. 472; *Younghusband v. Gisborne*, 1 Coll. C. C. 400.

⁸⁵ *Barlow v. Grant*, 1 Vernon, 255; *Nevill v. Nevill*, 2 Vernon, 431.

⁸⁶ *Barton v. Cooke*, 5 Vesey, 461. It is here said, if a legacy is given for the benefit of an infant one way, and it cannot be so applied, it may be applied for his benefit in another way, — as if it were to put him in orders, and he had become a lunatic.

⁸⁷ *Lewes v. Lewes*, 16 Sim. 266; *Noel v. Jones*, id. 309; *Leche v. Kilmorey*, T. & Russ. 207; *Attorney-General v. Haberdashers' Co.*, 1 My. & K. 420. Thus where a legacy of £6,500 was given at the discretion of the trustees to the testator's nephew for purchasing a commission in the army, and the nephew having expended £1,150 in obtaining a transfer from one regiment to another, when, by order in council, it became unlawful to purchase commissions, it was nevertheless held, by Vice-Chancellor *Bacon*, that the legatee was entitled to the full sum. But the Court of Chancery Appeal in *Ward's Trusts*, L. R. 7 Ch. App. 727, held the opposite view, which seems the more reasonable one.

thus, — “That where a legacy is given for the benefit of an infant, in a particular mode, it must be taken to be a general legacy;” and this, we apprehend, is the rule by which this class of cases is determined.

14. But where the trustees have a discretion in regard to the amount which they shall apply for the benefit of the cestuis que trustent, and apply less than the whole fund in the exercise of that discretion, nothing more can be claimed, either by the donee or his personal representatives.³⁸ And where the gift is absolute, and the trustees fail to apply the whole according to the directions of the will, the portion reserved will go to the personal representatives.³⁹

15. Where the motive or purpose of the gift is the benefit of others, as well as the donee, courts will, in some cases, assume the enforcement of the trusts.

a. Where the bequest is such as to create no interest in the first donee, but that of a mere trustee for the benefit of others, the trustee will, in such case, be required by the courts to perform the trust; as where the testator gave the residue of his property to his sister, to be disposed of by her among her children as she might think proper, it was held to create no interest in the sister,⁴⁰ but to be a complete trust for the children. But here care is to be taken to distinguish between that class of cases where the gift is really to the donee, to enable him the better to discharge his duty to * others, as to parents, to enable them to support their * 421 children in a comfortable manner, and that other class

³⁸ *In re Sanderson's Trusts*, 3 Kay & J. 497; *Cutter v. Hardy*, 48 Cal. 568.

³⁹ *Beevor v. Partridge*, 11 Sim. 229. In this case the court held that there was an absolute gift of the entire income of the fund to the three children of the testator and the survivor of them, with a power to the trustees to modify the distribution of the same; and that whether they exercised the power or not, or however defectively they might exercise it, the gift would remain. If the whole income is needed for maintenance, the result is the same as if there was an absolute trust. *Rudland v. Crozier*, 2 DeGex & J. 143. But where there is no absolute gift and the discretion upon which it depended is not exercised during the life of the donee, it wholly fails. *Cowper v. Mantell*, 22 Beav. 231.

⁴⁰ *Blakeney v. Blakeney*, 6 Sim. 52. But see *Taylor v. Bacon*, 8 Sim. 100. Where the interest is secured to one for his own benefit and that of his children, it has been construed as a gift, to enable him to maintain his children. *Robinson v. Tickell*, 8 Vesey, 142; *Cooper v. Thornton*, 3 Br. C. C. 96, 186; *Brown v. Casamajor*, 4 Vesey, 498.

where the donee is a mere trustee for the benefit of others. The cases which have been held to belong to these different classes seem to us to have been distinguished from each other by very narrow boundaries.⁴¹ In many of the cases already cited,⁴¹ the donee and the others named, for whose benefit the gift is expressed to have been made, have been held to have a joint-interest.

b. There is also another class of cases, where the donee is held to have incurred, by the terms of the bequest, a duty towards others, for whose benefit the bequest was in fact made, and, in regard to the exercise of such duty, to be liable to the control of a court of equity, to the extent at least of requiring him to exercise an honest judgment in the matter.⁴² But the mode and the extent of interference depend upon the particular phraseology in each case.⁴³ Where the residue of an estate was directed to be paid to the testator's niece, to be applied by her, at her discretion, for the education of her son, she not to be liable to account to him, or to any other person, for the disposal or application of the same, it was held that she was entitled to the whole residue, which was considerable, subject to the application of so much as the court might think fit to the education of the son during his minority.⁴⁴ And, in general, where the gift is to one, for the accomplishment of a particular purpose as to others, the donee will hold the fund, beyond any control of the courts, so long as the duty specified shall be faithfully performed.⁴⁵ But even where the testator gave his residuary estate to his wife, to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advanta-

⁴¹ *Jubber v. Jubber*, 9 Sim. 503; *Chambers v. Atkins*, 1 Sim. & Stu. 382; *Wetherell v. Wilson*, 1 Keen, 80; *Wilson v. Maddison*, 2 Y. C. C. C. 372; *Re Harris*, 7 Exch. 344.

⁴² 1 Jarman (ed. 1861), 370.

⁴³ *Castle v. Castle*, 1 DeG. & J. 352.

⁴⁴ *Hamley v. Gilbert*, Jacob, 354.

⁴⁵ *Gilbert v. Bennett*, 10 Sim. 371. Some questions have been made in the reported cases in regard to the period at which an alimentary stipend for children shall cease. In *Badham v. Mee*, 1 R. & My. 631, it was decided that a bequest for "maintenance, education, and *bringing up*," had reference prima facie to the period of minority. But in *Soames v. Martin*, 10 Sim. 287, a bequest for "maintenance and education" was held not limited to that period. And a similar view is taken in *Ellis v. Maxwell*, 3 Beav. 587.

geous, it was held that the wife did not take an absolute interest.⁴⁶

c. There is a considerably numerous class of cases where the bequest has been held to vest an absolute title in the donee, and the expression, by the testator, of the purpose and object of the gift, has been held merely descriptive of the motive of the testator in making the provision. Such are gifts to a father, the better to enable him to provide for his younger children,⁴⁷ toward the maintenance, education, and bringing up of the donee's children;⁴⁸ to enable the donee to assist such of the children of his deceased brother as he might find deserving of encouragement;⁴⁹ to enable the testator's wife to support herself and her children, according to her discretion.⁵⁰ It has been held, that a distinction is to be made between a gift to one, for the maintenance and education of another,

⁴⁶ *Raikes v. Ward*, 1 Hare. 445. There are many other cases where this question is discussed, and similar principles to those already stated have been adopted. *Hadow v. Hadow*, 9 Sim. 438; *Leach v. Leach*, 13 Sim. 304; *Browne v. Paull*, 1 Sim. N. S. 92; *Bowden v. Laing*, 14 Sim. 113; *Longmore v. Elcum*, 2 Y. & C. C. C. 363; *Crockett v. Crockett*, 2 Phill. C. C. 553, reversing the decision in same case, 5 Hare, 326. This last case was that of a bequest by the testator, "to be at the disposal of his wife for herself and children;" and Vice-Chancellor *Wigram* held that it created a joint-tenancy in the wife and all the children. But the Chancellor held, there was no joint-tenancy, but that the widow, although not entitled to the property absolutely, had a personal interest in it, and, as between herself and her children, was either a trustee of the fund, with a large discretion as to the application of it, or she had a power in favor of the children, subject to a life-interest in herself. The present rule seems to be to construe bequests to the widow for the benefit of herself and children, or to herself and the testator's children by more than one wife, she being one, as creating an estate for life in the mother, and remainder in fee to the children. *Newill v. Newill*, L. R. 12 Eq. 432; *Combe v. Hughes*, 14 Eq. 415. See also *Conolly v. Farrell*, 8 Beav. 347; *Woods v. Woods*, 1 My. & Cr. 401; *Costabadie v. Costabadie*, 6 Hare, 410; *Cowman v. Harrison*, 10 Hare, 234; *Smith v. Smith*, 2 Jur. N. S. 967. See *Jemison v. Smith*, 37 Alab. 185.

⁴⁷ *Brown v. Casamajor*, 4 Vesey, 498.

⁴⁸ *Hammond v. Neame*, 1 Swanst. 35.

⁴⁹ *Benson v. Whittam*, 5 Sim. 22.

⁵⁰ *Thorp v. Owen*, 2 Hare. 607. Vice-Chancellor *Wigram* here says, that a bequest to one to increase his funds, so that he might be the better able to do something named as the motive of the gift, is an absolute gift. Thus a legacy to enable one the better to pay his debts creates no trust which the creditors could enforce; and so, *prima facie*, of a gift, the better to enable one to maintain and educate his children.

where the donee was under no legal obligation to maintain that person, and a gift to one having such obligation upon him, the better to enable him to do so.⁵¹

* 423 * d. It is well said by Mr. Jarman,⁵² that the courts, at some periods, have gone almost to an absurd length, in construing the slightest intimation of a desire to have the avails, or any part of the avails, of a legacy or devise, appropriated in a particular manner by the devisee or legatee, into an obligatory trust for that purpose; and this learned and prudent writer suggests the propriety of always accompanying such expressions of wish or desire on the part of testators with the explicit declaration, that nothing obligatory is intended. This, we think, is what is always intended by testators, in the use of these hortatory expressions in their wills toward the recipients of their bounty. There is scarcely one man in a thousand, who would, in such cases, use any such indefinite and optional forms of expression toward those whom he expected to assume a binding duty and obligation to others in regard to the corpus, or the income, of the bequest. He uses such precatory words because he desires to leave it to the *discretion* of the donee; and, if he intended to control that discretion, he would adopt very different language. So that, probably, in nine cases out of ten, where the courts have raised a trust out of such mere words of wish and exhortation, it has been done contrary to the expectation of the testator, and more out of regard to the moral than the legal duty of the donee. And we are happy to perceive, in the later English cases, a disposition to return to this obvious and natural construction of the words of the will in these respects, and to leave the results of misplaced confidence, where all such consequences properly rest, with the parties concerned.

e. There are recommendations of a different character, which have been somewhat discussed in the English courts, such as to continue tenants and others in the occupation of premises devised, which have been held to create a trust on behalf of such persons.⁵³ And where one is designated as being continued in the office of

⁵¹ *Thorp v. Owen*, *supra*; *Byne v. Blackburn*, 26 Beav. 41; *Biddles v. Biddles*, 16 Sim. 1; *Berkeley v. Swinburne*, 6 Sim. 613; *Jones v. Greatwood*, 16 Beav. 527; *Hart v. Tribe*, 18 Beav. 215; *Wheeler v. Smith*, 1 Gif. 300.

⁵² 1 Jarman (ed. 1861), 374.

⁵³ *Tibbits v. Tibbits*, 19 Vesey, 656; *Quayle v. Davidson*, 12 Moore, P. C. C. 268.

agent, receiver, or steward of the testator's estates, it has been generally held to create an interest in such person, which the courts of equity will enforce.⁵⁴

f. But this rule has been considerably shaken in the case of *Lawless v. Shaw*,⁵⁵ which occurred in Ireland while Lord St. * *Leonards* was Chancellor there. The testator devised * 424 for life some of his estates, in trust, for the benefit of William Shaw, then aged twenty, with remainder over in strict settlement; with a special request that Lawless, his former steward and agent, should be continued, both by the executors, during the minority of the devisee, as well as by the devisee after he came into possession of the estates, which was not done; and the agent brought a bill to compel the performance. Lord *Plunkett*, M. R., decided against the prayer of the bill; and his decree was reversed by Sir *E. Sugden*, as Chancellor; but, on appeal to the House of Lords, the decree of the Chancellor was reversed, and that of Lord *Plunkett* affirmed.⁵⁶ The decision in the House of Lords seems to have proceeded somewhat upon the ground, that a gift of an estate to one person is inconsistent with a direction that another shall have the management of it. Lord *Cottenham*, Chancellor, said: "If Lawless's title is what it has been argued to be, he has an equitable charge on the legal estate of Shaw," &c.; arguing at length the absurdity of the testator having any such purpose, in expressing his particular desire to have him continued in the management and control of the estate. To all this we fully accede, but not upon any such ground as seems to have been uppermost in the mind of the learned Chancellor. To us there is no innate absurdity in one man having an equitable any more than in having a legal incumbrance upon the estate of another, or in its consisting in the right to manage and control it for the benefit of another. This is always the case, in plain Saxon English, where an estate is conveyed to trustees for the benefit of others.⁵⁷

⁵⁴ *Hibbert v. Hibbert*, 3 Mer. 681; *Williams v. Corbet*, 8 Sim. 349.

⁵⁵ Ll. & Goold, temp. Sug. 154.

⁵⁶ *Lawless v. Shaw*, 5 Cl. & Fin. 129.

⁵⁷ Lord Chancellor *Sugden*, in *Lawless v. Shaw*, Ll. & Goold, temp. Sug. 154, where his lordship said: "Then it is said, suppose the testator recommended the devisee to employ a particular baker or tailor. Well, suppose the testator did make such a condition, in clear, express terms; for it would not be implied: a man may devise an estate under any condition he pleases, provided it is not an illegal one."

But if that had been the purpose of the testator, we confess it passes our comprehension why he should choose to express it in this equivocal mode; or rather, we will say, not express it at all. It seems to us, the argument in the House of Lords is not well calculated to distinguish this from other cases of the same class, but rather to show that this entire class of decisions rests upon no satisfactory basis. To our mind, the argument of Lord *St.*

* 425 *Leonards* is the more * satisfactory, upon the basis of the former decisions being sound. But upon the theory that the question is still open for consideration, as *res integra*, we accord to the House of Lords the credit of having shown very sufficient grounds for disregarding all assumed trusts resting upon mere words of wish, desire, prayer, or exhortation; and we are happy to hail the decision, as having virtually subverted the former rule upon that subject.

g. It seems to be settled in some of the American states, that in a general devise to the testator's wife, or to others, with the absolute power of disposition, no trust arises from mere suggestions of the testator's confidence that the devisee will make a particular disposition of the estate at her decease, but that an absolute fee-simple is created.⁵⁸

h. In some very late cases in England, a very decided inclination is manifested to give merely precatory forms of expression only their natural force; as where one was appointed residuary legatee of an estate, with the desire that the residuary estate be afterwards left, in the names of the testator and the legatee, to charitable purposes, it was held to raise no trust, but to operate as an absolute gift.⁵⁹ So also, in a late case in equity in Ireland, it was held, that where the testator devised a dwelling-house to his wife, expressing "his earnest wish that his sister should reside in the house with his wife during her life," it was held to create no trust in favor of the sister.⁶⁰

⁵⁸ *Kinter v. Jenks*, 43 Penn. St. 448, citing *Heath v. Knapp*, 10 Watts, 405; 4 Penn. St. 228; *Spooner v. Lovejoy*, 108 Mass. 529.

⁵⁹ *McCulloch v. McCulloch*, 11 Weekly Reporter, 504.

⁶⁰ *Graves v. Graves*, 13 Irish C. 182. It is said that precatory words do not necessarily convert an absolute gift into a trust. *Godfrey v. Godfrey*, 11 W. Rep. 554. In *Scott v. Key*, 11 Jur. N. s. 819, 35 Beav. 291, the testator made a devise to his wife, "being well assured that she will husband the means that may be left to her by me with every prudence and care, for the sake of herself and any children I may leave by her;" and the devisee was held to take an

* i. And where the testator placed a portion of his estate, * 426 constituting the equal share of a portion of his children therein, in the hands of trustees, directing them to pay over the income to such children or their issue, but giving them a discretion to withhold such portion of any share as they might deem for the benefit of the cestui que trust, it was held that this did not give any discretion to withhold the whole income from any of the beneficiaries, and add the same to income, but that such trustees were under the control of the court of chancery.⁶¹

k. The American courts have held bequests for merely conjectu-

absolute fee-simple. And in *Hood v. Oglander*, 12 Law T. N. s. 626, where the testator devised lands to his son in fee, with an earnest request that he should not sell, alien, or dispose of the same, except by way of exchange or investment, and, if the devisee should die without leaving male issue, it was the testator's anxious desire that his son would so devise and settle the same, that they might continue in the name of the testator, it was held to create no trust. And where the testator gave the residue of his personal estate to his wife, "for her own absolute use and benefit, in the fullest confidence that she would dispose of the same for the benefit of her children according to the best exercise of her judgment, and as family circumstances might require at her hands," it was held that the widow was entitled for life, with a precatory trust in remainder in favor of her children. *Shovelton v. Shovelton*, 32 Beav. 143. And in a late case before Vice-Chancellor *Kindersley*, *Evans v. Evans*, 33 Law J. Chanc. N. s. 662, where the testator bequeathed his whole estate to his wife "absolutely, and to be by her willed to any or either of my children, in any manner suitable to her wishes, to hold to her for ever," it was held that the wife took the property absolutely, but that a trust was ingrafted upon it for the benefit of the children who might survive her, with a power to appoint it among them by will as she saw fit. But it was considered that a will devising part of the estate to one of the sons in liquidation of a debt due him from the testator, or an agreement with another son that he should have the property upon the condition of paying the debt to the first son, and also stipulating for certain benefits to himself, could not be regarded as any exercise of the power. And in *Van Amee v. Jackson*, 35 Vt. 173, it is said by *Kellogg, J.*: "In giving a construction to precatory words in a devise, a court of equity will look at the circumstances existing at the date of the will, and, if necessary, will construe words [ordinarily] importing a trust as mere expressions of recommendation or confidence." Where the testator gave his personal estate to his wife, and expressed a "wish and desire" that all his real estate might be equally divided among his eight children named, it was held sufficiently dispositive to create a vested interest in the devisees from the death of the testator. *Brasher v. Marsh*, 15 Ohio, N. s. 103.

⁶¹ *Williams v. Bradley*, 3 Allen, 270. The income accruing in the hands of the executor is subject to the same direction as that accruing after the fund is paid over by the executors. *Ib.*

ral objects, although resting in the discretion of the executors, or other trustees named for that purpose, void, upon the ground that a court of equity cannot administer the trust. Thus, where a bequest is made "to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria, leaving the same entirely to their disposition of it, in such manner as appears to them promises to yield the
 * 427 greatest good," the * Supreme Court of the United States held the same void for uncertainty, and decreed the property to the heir.⁶²

1. Mr. Justice *McLean*, after reviewing the English cases, said, "From the principles laid down in the above cases, it is clear that the devise under consideration cannot be sustained. A trust is vested in the executors; but the beneficiaries of the trust are uncertain, and the mode of applying the bounty is indefinite. It is argued that the testator intended to give to the town of Alexandria, in its corporate capacity, the residuum of his estate. But he did not so express himself. On the contrary, it clearly appears that the executors were made the repositories of his confidence, and the only persons who were authorized to administer the trust; the cestui que trusts were the town, and the trade of the town. It would be difficult to express, in more indefinite language, the beneficiaries of a trust. How can a court of chancery administer this trust? On what ground can it remove the trustees for an abuse of it? . . . Without the application of the doctrine of *cy pres*, it could not be carried into effect. In Virginia, charitable bequests stand upon the same footing as other trusts, and, consequently, require the same certainty as to the objects of the trust, and the mode of its administration."

m. But in an early case in Connecticut,⁶³ it was held, in regard to the devise of the residue of an estate to two of the testator's brothers by name, and who were the executors of the will, "with full confidence that they will settle my estate according to my will, and that they will dispose of such residue among our brothers and sisters and their children as they shall judge shall be most in need of the same, this to be done according to their best discretion," —
 1. That a trust was created by the will in favor of the brothers

⁶² *Wheeler v. Smith*, 9 How. (U. S.) 55, 80.

⁶³ *Bull v. Bull*, 8 Conn. 47. See *Portsmouth v. Shackford*, 46 N. H. 423.

and sisters and their children ; 2. That the executors and their children were not objects of the testator's bounty, and took no beneficial interest under the will ; 3. That the estate given vested, on the testator's death, in A. and B., the executors, as trustees, for the use of the brothers and sisters and their children, to be by them enjoyed, as provided in the will ; and that, consequently, after-born children, and those who became needy thereafter, could not take ; 4. That the devise was not void for uncertainty in regard to the *beneficiaries of the trust, as a rule was given * 428 by which they might be ascertained ; namely, *the most needy* of the brothers and sisters and their children ; 5. That, the executors having died without having exercised the power, it was competent for the court of chancery to exercise it.

n. The subject has been before the same court in later cases. In *Gilbert v. Chapin*,⁶⁴ the testator devised all his estate, real and personal, after payment of debts, to his wife, "and to her heirs for ever," recommending to her to "give the same to my children, at such time and in such manner as she shall think best." The testator left two children. The widow married again, and her second husband survived her ; she having, by will, left all her estate to the children of her first husband. It was decided that the widow took an absolute estate in fee-simple under the will of her first husband, not incumbered by any trust in behalf of his children, and consequently that the second husband acquired an estate by curtesy in the real estate so devised to his wife. In a still later case, *Harper v. Phelps*,⁶⁵ a somewhat similar question arose ; and the court held, where an annuity is left a person to enable him to maintain the testator's homestead in a condition to afford a home for his relatives, as he had done in his lifetime, somewhat, but the disbursement of the bounty is left in the absolute discretion of the legatee, that a court of equity could not control the exercise of such discretion ; that, to raise a trust, it must be capable of ascertainment what proportion each beneficiary is to take ; and that a court of equity will not raise a trust from words importing recommendation, hope, confidence, desire, &c., where the objects of the trust are not definite and certain ; or where a clear choice to act, or not to act, is given ; or where the prior dispositions import an absolute and uncontrollable ownership. This seems to be bringing

⁶⁴ 19 Conn. 342.

⁶⁵ 21 Conn. 257.

the matter to the point of the English cases already cited and commented upon. And similar views are maintained in other American cases.⁶⁶ But other American cases seem to have adopted the view of construing almost any wish or desire of the testator into a trust, without regard to the question how far he intended to control the conduct of the devisee or legatee.⁶⁷

* 429 * o. Where property is devised to one in trust to be applied toward the support of an insane pauper, as the trustee should judge right and equitable, provided the town chargeable with the maintenance of the pauper shall pay a reasonable sum annually for the same purpose, and a bill was brought by the town to compel the trustee to apply the income of the trust-fund toward the maintenance of the pauper, the court held that the town had no such interest in the fund as to enable it to maintain a bill: the pauper, being the only cestui que trust, was the proper party, by her guardian, to bring a bill to enforce the trust. But, as the terms of the trust gave a discretion to the trustee how much he would apply towards the support of the pauper, the court could not interfere, so long as that discretion was honestly and fairly exercised.⁶⁸

16. Where one transferred a debenture of £1,000 to three persons, there being no evidence of the purpose of the transfer, except an expression in the transferror's letter written shortly before the transfer to his solicitor, wherein the three persons are named as trustees "for my niece Mrs. C. M. and her children," it was held that a valid trust was thereby created in favor of C. M. for life,

⁶⁶ *Re Pennock's Estate*, 20 Penn. St. 268; *Thompson v. McKisick*, 3 Humph. 631.

⁶⁷ *Collins v. Carlisle*, 7 B. Monr. 14; *Bull v. Bull*, 8 Conn. 47. But the question is always one of construction mainly; and no trust can be raised if it appear that the testator meant to depend on the sense of justice or gratitude of the donee to carry out his wishes. *Erickson v. Willard*, 1 N. H. 217; *Lucas v. Lockhart*, 10 Sm. & Mar. 466.

⁶⁸ *Sharon v. Simons*, 30 Vt. 458. But see *Heard v. Sill*, 26 Ga. 302. There seems to be no doubt, that where a testator intrusted the trustee with a discretion for the benefit of another, and he fails to exercise the same properly, in the opinion of the court, they may compel him to do what the trust, on a fair construction, requires. *Prewett v. Land*, 36 Miss. 495. Equity will appoint new trustees where the former ones refuse or neglect to act. *Gamble v. Dabney*, 20 Texas, 69. But where the matter rests entirely in the judgment and discretion of the trustee, and he acts in good faith and according to his best judgment, the question is not subject to revision in a court of equity. *Hawes Place Society v. Hawes Fund*, 5 Cush. 454.

and afterwards of her children as joint-tenants. The trustees paid the income of the fund to C. M. during life, and then transferred the fund into court, and sought direction as to the further disposition of it. The Vice-Chancellor held the surviving children of C. M. entitled to take the whole fund, and that nothing could go to the issue of any deceased child.⁶⁹ It would seem more in conformity with established principles to treat the children of C. M. as taking vested interests in remainder from the time of the creation of the trust, as to all then born, and from the birth of such as were born after.⁷⁰

17. Where the testator devised all the residue of his real and personal estate to a married woman, her heirs and assigns for ever, upon trust "as to all the freehold," as he proceeded to declare, "and as to the personal property so given as aforesaid to the said married woman, to and for her own proper use and benefit for ever," "and the proceeds to be applied by her in the bringing up and maintenance of" all her children, the legatee having deceased, leaving several infant children, it was held she took an absolute interest in the personalty, unaffected by any trust.⁷¹

⁶⁹ *Bellasis' Trusts*, L. R. 12 Eq. 218.

⁷⁰ *Ante*, § 17, pl. 11, n. 18. But see *Owen's Trusts*, L. R. 12 Eq. 316.

⁷¹ *Mackett v. Mackett*, L. R. 14 Eq. 49.

ADEMPTION AND SATISFACTION OF DEVISES AND LEGACIES.

SECTION I.

THE ADEMPTION OF SPECIFIC LEGACIES.

1. This occurs whenever the thing ceases to be the property of testator before his decease.
2. The destruction of the fund, out of which demonstrative legacies payable, not ademption.
3. Where chose in action specifically bequeathed, but subsequently paid, legacy adeemed.
4. Partial payment, ademption pro tanto. Intention of testator of no account.
5. Bequest of money arising from chose in action not adeemed by payment of same.
6. Stock, specifically bequeathed, is adeemed by any voluntary change of title.
7. But not where it is effected by operation of law, or is only in regard to the name of the trustees.
8. Mere intention or direction to change fund will not adeem legacy. Nor will an unauthorized change.
9. The bequest of share in profits of a partnership not adeemed by renewal of articles.
10. Pledging or mortgaging goods specifically bequeathed will not adeem legacy.
11. Bequests of furniture in a particular house or place are adeemed by testator's removal of them, but not if done without his concurrence. Some exceptions to this rule stated.
12. Locality in a bequest may be referred to as a limitation, or as a mode of definition.
13. Bequest of terms for years may refer exclusively to date of will, or may embrace all testator dies possessed of.
14. Bequest of equitable interest not adeemed by change of trustee.
15. Bequest of residuum not affected by change of title.
16. Mere partition of estate no such change of title as to adeem bequest.
17. Republication will not revive legacies adeemed, but will pass all estates possessed at date of republication.
18. Ademption of specific legacy will not revive general legacy, for which the specific legacy had been substituted.
19. Subject further considered under head of Specific Legacies.
20. The question of adeeming legacies by calling in fund discussed by American courts.
21. Slight changes in fund no ademption. Testator's intention to be considered.
22. Where the thing is changed by any other person than the testator, it is not an ademption.

* § 26. 1. LEGACIES which are specific are said to be * 431 adeemed when the particular thing given is either wholly lost, destroyed, or disposed of, by the testator during his life, or its form so changed as not to remain in specie. Thus if the thing given as a specific legacy be sold by the testator, or otherwise disposed of during his lifetime, or its form be changed, as by manufacturing wool or other material into cloth, or gold or silver into a cup or other utensil, it is lost or destroyed; so that if the subject-matter of the legacy either ceases to be the property of the testator, or is so changed during his life as no longer to be susceptible of identification, the legacy is said to be adeemed, or gone.¹

2. It may be well to repeat here, what may have been before intimated, that demonstrative legacies — i. e., of money payable out of a particular fund — conform more to the incidents and analogies of general than to those of specific legacies. Hence the disposal or destruction of the particular fund out of which a demonstrative legacy is payable will not adeem or extinguish the legacy.²

3. In going more into detail upon this subject, we find the cases more conveniently range themselves according to the subject-matter of the legacies. Where a chose in action is specifically bequeathed, and subsequently paid to the testator in money, and that money commingled with his other moneys, no question remains that the entire legacy is adeemed.³ But where, as in some cases, the testator, after having received the money, invests it in some other form, and leaves the bequest standing as before, there arises a very strong presumption that he intended the new form of

¹ *Ashburner v. Macguire*, 2 Br. C. C. 108. So if the goods have been destroyed by accident during the life of the testator, or perished at sea in the same ship with the testator, the legacy of them is gone, since they must be shown to have existed after the death of the testator in specie. *Durrant v. Friend*, 5 DeG. & Sm. 343; *Ford v. Ford*, 3 Foster, N. H. 212; *Walton v. Walton*, 7 Johns. Ch. 258, 262. And it will make no difference that the thing bequeathed proves not to have been the property of the testator: it cannot be made up to the legatee on that account out of other portions of the estate. *M'Kinnon v. Thompson*, 3 Johns. Ch. 307. See also *White v. Winchester*, 6 Pick. 48; *Roberts v. Weatherford*, 10 Ala. 72. And a contract to sell land, which a court of equity will enforce, will adeem the devise of the same, and the price will go into the residue of the estate. *Donohoo v. Lea*, 1 Swan, 119. See also *Birch v. Baker*, *Moseley*, 374.

² 2 Wms. Ex'rs, 1189, 1190. This point is discussed, ante, § 7, pl. 11 et seq.

³ *Badrick v. Stevens*, 3 Br. C. C. 431; *Rider v. Wager*, 2 P. Wms. 329, 330.

* 432 the * investment to stand in the place of the former one ; but notwithstanding this strong presumption of intention on the part of the testator, the courts have strenuously maintained the indispensable necessity of the very thing remaining in specie a part of the estate at the decease of the testator, in order to give effect to a specific legacy, and that this question cannot be materially affected by any considerations of intention on the part of the testator.⁴

4. So a partial receipt of the sum due upon a debt specifically bequeathed will operate as an ademption pro tanto.⁵ And it will make no difference in this respect whether the creditor call in the debt, or it is voluntarily tendered him by the debtor ; thus effecting, in some sense, a compulsory payment,⁶ notwithstanding some of the early cases attempted a distinction of this kind.⁷ The question of intention in determining the existence of a specific legacy at the time of the decease of the testator is not commonly to be taken into the account, since that would lead to endless uncertainties. It is a question of identity merely, to be determined by applying the words in the will to the estate of the testator.⁸

⁴ *Barker v. Rayner*, 5 Madd. 208 ; s. c. before Lord *Eldon*, Chancellor, on appeal, 2 Russ. 122 ; *Gardner v. Hatton*, 6 Sim. 93.

⁵ *Ashburner v. Macguire*, 2 Br. C. C. 108.

⁶ *Sir R. P. Arden*, M. R., in *Innes v. Johnson*, 4 Vesey, 568, 574 ; *Ashburner v. Macguire*, 2 Br. C. C. 108, 110 ; *Fryer v. Morris*, 9 Vesey, 360 ; *Barker v. Rayner*, 5 Madd. 208 ; s. c. 2 Russ. 122.

⁷ *Orme v. Smith*, 1 Eq. Cas. Ab. 302, pl. 2 ; s. c. 2 Vern. 681 ; *Crockett v. Crockett*, 2 P. Wms. 164 ; *Ellis v. Walker*, Amb. 309, and many other cases cited ; 2 P. Wms. Ex'rs, 1192, n. (p).

⁸ *Humphreys v. Humphreys*, 2 Cox, 184. Thus, where the testator had bequeathed specifically a bond and mortgage, and subsequently foreclosed the mortgage and sold again to the same party, taking back a new bond and mortgage, leaving a memorandum to the effect that the new mortgage was but a renewal of the one bequeathed, and that he intended it to pass to the legatee, it was held that the legacy was, nevertheless, adeemed. *Beck v. McGillis*, 9 Barb. 35. But the mere change of the form of a security for the fund bequeathed specifically will not adeem the legacy. *Gardner v. Printup*, 2 Barb. 83. It is said by the learned Surrogate, in *Doughty v. Stillwell*, 1 Brad. Sur. Rep. 300, that whether a specific legacy be adeemed by a change of the particular form in which the thing given exists depends upon the terms of the gift, the intention of the testator, the extent or nature of the alteration, and the circumstances attending it. But the best considered cases, as before intimated, treat it as a question of identity, and not of intention. *Hoke v. Herman*, 21 Penn. St. 301.

5. But a distinction is to be observed between the bequest of a * thing in action, as a particular security for money, * 433 and a bequest of the money which may arise or be received upon such a claim; since in the latter case it is not inconsistent with the bequest, that the testator should receive the money in his lifetime, and reinvest it in another form.⁹

6. The same rules apply to specific bequests of other things. Thus where stock is specifically bequeathed, and, before the death of the testator, ceases to exist as part of his estate, either wholly or in part, to that extent the legacy is adeemed.¹⁰ And it is even held, that the conveyance of the stock, and purchasing an equal amount of the same kind of stock, will nevertheless operate to adeem the legacy,¹¹ upon the same or an analogous rule of

⁹ *Clark v. Browne*, 2 Sm. & Gif. 524; *Bronsdon v. Winter*, Ambler, 57. It is said in some of the early cases, that if the testator collects a debt specifically bequeathed for any specific reason, as because it was becoming insecure, it shall not be treated as an ademption. *Hambling v. Lister*, Ambler, 401; *Graves v. Hughes*, 4 Madd. 381. A distinction seems to be maintained in regard to the effect of selling property specifically bequeathed, whether the specific bequest was of the property itself, or its proceeds; in the former case it being an ademption, and not in the latter. *McNaughton v. McNaughton*, 34 N. Y. 201. See also *Warren v. Wigfall*, 3 Desaus. 47; *Nooe v. Vannoy*, 6 Jones, Eq. 185; *Chambers v. Kerns*, 6 Jones, Eq. 280.

¹⁰ *Ashburner v. Macguire*, 2 Br. C. C. 108; *Sleech v. Thorington*, 2 Ves. Sen. 560; *Drinkwater v. Falconer*, 2 Ves. Sen. 623. But the mere consolidation of shares into stock will not operate as an ademption. *Oakes v. Oakes*, 9 Hare, 666. Upon the general question of the ademption of legacies in stock by parting with the title by the testator during his lifetime, see *Blackstone v. Blackstone*, 3 Watts, 335; *Schrivver v. Cobean*, 4 id. 130. And it seems, if the particular shares bequeathed are sold, and others of the same kind subsequently purchased to a larger amount, the legacy will still be regarded as adeemed. *Gibson in re*, Law Rep. 2 Eq. 669. But where a devise was adeemed by a subsequent settlement of the property, it was held that a codicil made after the settlement, purporting to confirm the will in every respect, will operate as a republication of it, and (subject to the rights of those entitled under the settlement) revive the devise which was revoked by the settlement. *Harvey v. Lloyd*, 17 W. R. 990.

¹¹ *Pattison v. Pattison*, 1 My. & K. 12. Sir *John Leach*, M. R., here said, "The law is settled that a legacy is adeemed if the specific thing do not exist at the testator's death." But where the testator bequeathed to his wife his stock in an insurance company, which lost its stock in the course of its business after the making of the will, and, on its stock being again filled, the testator paid up in full a portion of his shares, and retained them until his death, it was held, that, as to that portion, the legacy was not adeemed. *Havens v.*

* 434 * construction to that which regards any alteration in the title of real estate as a revocation of the devise, to that extent, under the former English statute.¹²

7. But no ademption will take place where the change in the thing bequeathed is effected by operation of law; as where a fund is converted into one of a different description by act of Parliament.¹³ Nor will it operate to adeem the legacy, where the fund has been transferred into another fund by the trustee, without the concurrence of the testator,¹⁴ or from the name of the trustee into the testator's own name,¹⁵ or when the names of the trustees only have been changed.

Havens, 1 Sandf. Ch. 324. And in a recent English case, *Jones v. Southall*, 9 Jur. N. S. 93, S. C. 32 Beav. 31, 11 W. R. 217, the testatrix, in contemplation of a marriage, which took place in form, but was void, made an assignment of certain stocks and securities to trustees by way of settlement upon herself and husband, and subsequently by will directed the trustees, after the death of her husband, to hold the entire fund, in certain proportions, for such of several persons named as should be living at the decease of the husband. The husband died before the testatrix; and she then destroyed the settlement and assignment of securities to the trustees, and received back the securities. It was held, this did not amount to an ademption of the legacies, except as to that portion of the funds which the testatrix had disposed of, and for which she had received the moneys.

¹² Ante, pt. 1, § 26.

¹³ *Partridge v. Partridge*, Cas. temp. Talbot, 226. Where the testator bequeathed the income of certain shares specifically, and then bequeathed the shares to his residuary legatee, and after the date of his will was declared a lunatic, and by order of court the shares were directed to be sold, and the proceeds were invested in consols, but there was no order as to the ownership, it was held the sale was a conversion, and adeemed the specific bequest of the income, which thereby fell into the residue. *Jones v. Green*, Law Rep. 5 Eq. 555. Sed quære. And Vice-Chancellor *Giffard* puts the case upon the ground, that if the order for conversion of the shares had directed that it should be done without affecting the title of any party to the income of the shares, the price paid standing in the place of the shares, then the bequest of income would not have been adeemed. But it would seem that when the conversion was made without any purpose of applying the proceeds for the benefit of the lunatic, but only to preserve them, it would have been more reasonable and just to hold the conversion no ademption. But the learned judge, in deciding the case as he did, went mainly upon the ground that the Act in Lunacy, 16 & 17 Vict. ch. 70, saved the rights of devisees, where real estate was converted by order of court; and, not extending to personalty, there was no ground of implication that the same result would follow as to that, but the contrary.

¹⁴ *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

¹⁵ *Dingwell v. Askew*, 1 Cox, 427.

8. And it seems to be settled, that the mere intention, and direction by the testator, to have the form of the thing changed, but * which was never carried into effect, or the * 435 fact that an unauthorized change in the thing was made by the plaintiff's agent before his death, but of which he never had knowledge, will not be sufficient to adeem the legacy.¹⁶

9. It was held, where the testator bequeathed a specific portion of his profits in a certain partnership, and subsequently renewed the articles with the same partners, giving them a greater interest than they had before, that this did not operate to adeem or revoke the legacy, but the legatee took the proportion of profits specified as they existed at the decease of the testator.¹⁷

10. As to the adeption of legacies in goods, it seems that merely pledging or mortgaging them will not have this effect, since the right of redemption still remains in the testator, and that will pass under the bequest, so as to enable the legatee to call upon the executor to redeem the thing, and deliver it to him.¹⁸

11. Where goods are bequeathed with reference to a particular locality, as all the testator has, or all of a particular description, in a particular house or place, and they are afterwards removed to another place, this will have the effect to adeem the legacy.¹⁹ And it will make no difference that the goods are removed because the lease of the testator's house had expired.²⁰ But if they are removed on account of fire,²¹ or without the testator's knowledge, or by fraud, it will not have that effect.²² And where the place is referred to merely to identify the goods at the time, as all testator's goods in a certain ship,²¹ or where the bequest is of all the testator's furniture in a particular house where he was living at the time of making the will, but had another house, living alternately in either, and having but one set of furniture, which he carried from one house to the other, it will make no difference in which house the

¹⁶ *Basan v. Brandon*, 8 Sim. 171; *Patton v. Patton*, 2 Jones, Eq. 494.

¹⁷ *Backwell v. Child*, Amb. 260.

¹⁸ *Ashburner v. Macguire*, 2 Br. C. C. 108, 113, by Lord *Thurlow*, Chancellor.

¹⁹ *Green v. Symonds*, 1 Br. C. C. 129, in n.; *Heseltine v. Heseltine*, 3 Madd. 276; *Colleton v. Garth*, 6 Sim. 19.

²⁰ *Colleton v. Garth*, 6 Sim. 19.

²¹ *Chapman v. Hart*, 1 Ves. Sen. 271.

²² *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

furniture happens to be at the testator's decease: the legacy, being evidently of all testator's furniture, is not adeemed by the change from one house to the other.²³

* 436 * 12. A distinction is taken, as before stated, in regard to the bequest of goods or other things being in a particular place, whether the place is referred to merely to identify the goods, or as the extent and measure of the legacy. Hence where the terms were, all the plate, pictures, household goods, and furniture, that should be in testator's house at Ryegate at the time of his decease, there could be no question that the voluntary removal of them from that house, by the testator or by his consent, during his life, must operate to adeem the legacy.²⁴ But where the testator bequeathed all his bills, bonds, &c., belonging to him, and lying in the lodging occupied by him, in the house of Mr. Smith, it was held, the words were only descriptive of the things intended to be conveyed, and therefore it was immaterial where they remained at the time of the testator's death.²⁵

13. As to the specific bequest of terms for years, where the language of the will is so strictly confined to the present tense as only to embrace those interests of which the testator is possessed at the date of the will, any change in the title which will destroy its identity will operate as a revocation or ademption of the legacy.²⁶ But where the language of the will is such as to embrace such terms as the testator may die seised of, it will receive that construction.²⁶

14. But where the testator is possessed only of the equitable interest, any change in the form of his title, by means of a sur-

²³ *Land v. Devaynes*, 4 Br. C. C. 537.

²⁴ *Shaftsbury v. Shaftsbury*, 2 Vern. 747.

²⁵ *Cunningham v. Ross*, 2 Cas. temp. Lee, 272; *Norris v. Norris*, 2 Coll. C. C. 719. In this last case it was held, that the words, "All my interest in my house at L., the furniture, books, pictures, wines," &c., were not limited to those in existence at the date of the will, but that all of that class of articles which the testator had in his dwelling at the time of his decease, although at another place to which he had removed, would pass under the bequest. See *Richards v. Humphreys*, 15 Pick. 133.

²⁶ *Abney v. Miller*, 2 Atk. 593, 597; *Slatter v. Noton*, 16 Vesey, 197, 199. See also *Rudstone v. Anderson*, 2 Ves. Sen. 418; *Hone v. Medcraft*, 1 Br. C. C. 261; *James v. Dean*, 11 Vesey, 383; s. c. 15 Vesey, 236; *Colegrave v. Manby*, Madd. & Geld. 83-85; *Porter v. Smith*, 16 Sim. 251.

render and renewal to the trustee, will not affect the bequest, it being regarded, in that case, as covering the equitable interest.²⁷

15. And the bequest will not be adeemed by any change in the title, where the bequest is of a residuary and not a specific * character, as of "all and singular my leasehold estate, * 437 goods, chattels, and personal estate whatsoever."²⁸

16. Mere partition of a term for years, and the execution of such conveyances as are requisite to carry such partition into effect, will not operate to adeem a specific legacy of the term.²⁹ The present English statute, it will be remembered, makes a will operate solely from the decease of the testator, and to pass all such estate belonging to the testator at that date as the words are calculated to embrace.³⁰

17. The mere republication of the will does not have the effect to revive legacies which have been adeemed, although it does have the effect to pass all such estate as the testator possesses at the date of the republication, and which corresponds to the natural import of the terms.³¹

18. And it is said, the ademption of a specific legacy will not have the effect to revive a general legacy, for which the specific legacy had been substituted.³²

19. The subject of the ademption of specific legacies is necessarily so far connected with the general subject of specific legacies as to be naturally treated, to a considerable extent, under that head, to which reference may be had for many of the leading cases, both English and American.³³

20. The American cases are considerably numerous upon this

²⁷ *Carte v. Carte*, 3 Atk. 174; s. c. Ambl. 28.

²⁸ *Stirling v. Lydiard*, 3 Atk. 199; *Digby v. Legard*, 2 Dick. 500. But see Lord *Eldon's* intimation to the contrary, in *James v. Dean*, 11 Vesey, 383, 390. That seems to have been the rule at an earlier day; but the one stated in the text has finally prevailed. See ante, pt. 1, § 26.

²⁹ *Woodhouse v. Okill*, 8 Sim. 115.

³⁰ 1 Vict. ch. 26, § 23.

³¹ *Drinkwater v. Falconer*, 2 Ves. Sen. 623; *Monck v. Monck*, 1 Ball & B. 298, 306; *Powys v. Mansfield*, 3 My. & Cr. 359; *Montague v. Montague*, 15 Beav. 565; *Alford v. Earle*, 2 Vern. 209; *Coppin v. Fernyhough*, 2 Br. C. C. 291.

³² 1 Roper, 331, citing *Hertford v. Lowther*, 7 Beav. 1, which does not seem to have much bearing upon the point.

³³ Ante, § 7.

point. We have before alluded to the leading American case.⁸⁴ The general question of adeeming specific legacies by calling in the fund is largely discussed in many other American cases.⁸⁵ * The matter is very extensively considered by the Virginia Court of Appeals, in *Hansbrough's Ex'rs v. Hooe and Wife*,⁸⁶ where President *Tucker* dissents from the conclusion of the majority.

21. There are many cases in the American courts where slight changes in a particular fund, specifically bequeathed, have not been treated as an ademption.⁸⁷ There are a considerable number of cases in the American courts where the question of the ademption of specific legacies has been allowed to turn, to some extent, upon the intention of the testator, as gathered from the surrounding circumstances, contrary to the English rule already stated.⁸⁸ The better rule seems to be that stated by *Shaw*, Ch. J.,⁸⁹ that, where any particular thing specifically bequeathed is disposed of by the testator, it will be an ademption of the legacy, "whatever may have been the intent or motive of the testator." But in regard to general legacies, "intention is of the very essence of ademption."

22. And where the testator made a specific bequest of the farming-stock which should be in his possession at the time of his decease, and subsequently became of unsound mind and so continued until his death, and a short time before his death the farming-stock was sold, and the money resulting from the sale placed to a separate account, it was held that there was no ademption, and that the money passed to the specific legatee of the stock.⁴⁰

⁸⁴ *Walton v. Walton*, 7 Johns. Ch. 258; ante, § 7.

⁸⁵ *Beck v. McGillis*, 9 Barb. 35; *Gilbreath v. Winter's Ex'rs*, 10 Ohio, 64; *Cogdell's Ex'rs v. His Widow*, 3 Desaus. 346, 384.

⁸⁶ 12 Leigh, 316.

⁸⁷ *Gardner v. Printup*, 2 Barb. Sup. Ct. 83; *Doughty v. Stillwell*, 1 Bradf. Sur. Rep. 300; *Smith v. Jones*, 4 Ohio, 115.

⁸⁸ *Beall v. Blake*, 16 Ga. 119. It was held that the bequest of notes to the amount of sixteen hundred dollars, naming the signers, for the purpose of purchasing a plantation, is not a specific legacy, and is not adeemed by the sale and transfer of the notes by the testator in his lifetime. *Smith v. Ex'rs of Smith*, 23 Ga. 21. ⁸⁹ *Richards v. Humphreys*, 15 Pick. 133, 135.

⁴⁰ In this case the conversion of the stock into money was made by the legatee himself; but the court regarded it the same as if done by any other person without the knowledge or consent of the testator. And in *Pilkington's Trust*, 6 N. R. 246, it was decided that a conversion of the thing specifically devised, by any other person than the testator, will not amount to an ademption.

* SECTION II.

* 439

THE ADEPTION OF GENERAL LEGACIES, AND THOSE GIVEN AS
PORTIONS.

1. Readiness of courts of equity to treat general legacies as adeemed by portions.
Lord Chancellor *Eldon's* exposition of the question.
2. Where the portion is less than the legacy, it only adeems it pro tanto.
3. It will not prevent the adeption, although there should be considerable variation between the portion and the legacy.
4. Many cases enumerated where no adeption takes effect.
5. The grounds upon which, and the extent to which, parol evidence is receivable in this class of cases.
6. Where a will or written instrument only is concerned, parol evidence not admissible to prove intention. Distinction between adeption and revocation to be carefully maintained.
- n. 13. The cases referred to by, and the views of, Sir *James Wigram*.
7. The views of Sir *James Wigram* and Sir *E. Sugden* philosophically sound; but they do not harmonize all the cases. Mr. Roper more indefinite.
8. The value of Sir *Edward Sugden's* classification of the cases requires an abstract to be given here.
 - (1.) Where legacy is adeemed by portion. Parol evidence admissible. Cases.
 - (2.) Where the legal presumption coincides with the natural import of the words, parol evidence not admissible, except to rebut contrary presumptions.
 - (3.) Where the legacy comes last in the order of time, parol evidence generally not admissible.
 - (4.) Where all the acts are testamentary, parol evidence not received.
9. Upon principle, this class of evidence confined to narrow limits. Not always so in practice.
10. Lord Chancellor *Cottenham's* exposition of the rule as to standing in loco parentis.
11. The existence of the relation may be proved by the acts and declarations of the person.
12. No presumption of satisfaction arises, unless the testator stands in the place of the father, or it otherwise appear such was the intention.
13. No other relation, of itself, sufficient to sustain the presumption.
14. The question discussed in a late case before the House of Lords.
15. Substitutionary legacies take all the incidents of the primary ones.
16. The American courts adopt mainly the English rules already stated.
17. How far the acts of testator will operate as an extinguishment of legacies by anticipation.
18. Gift of same sum will not adeem legacy, unless fully answering same purpose.
19. Power to appoint a charge on residue no adeption of existing one.

20. Gift to husband, on marriage of daughter, no ademption of daughter's portion ; but covenant to contribute to marriage settlement will be.
21. Gifts presumptively adeem legacies, unless there be satisfactory proof of some kind to the contrary, or no actual or quasi relation, as parent and child, exist between the parties.

§ 27. 1. THERE seems to have been manifested, in the courts of equity, a more ready disposition to treat advancements, by way of portions, as intended to adeem general legacies given to the same persons, where they were of the nature of portions, or a share in the estate of a father, or one standing in that relation, * 440 * than in almost any other class of cases. And in the language of Lord *Eldon*, Chancellor,¹ it seems to be settled in equity, "that where a father gives a legacy to a child, the legacy, coming from a father to his child, must be understood as a portion, though it is not so described in the will ; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance, and the advance is, therefore, an ademption of the legacy : but a stranger giving a legacy is understood as giving a bounty, not as paying a debt ; he must, therefore, be proved to mean it as a portion or provision, either upon the face of the will," or by evidence applicable to the point. This may be regarded as a fair statement of the present state of the law upon the point.²

2. It was at one time held, where the father gave his daughter a legacy in his will of £500, and subsequently, upon her marriage, gave her a portion of £300, and soon after died without altering his will, that the legacy was wholly adeemed.³ But in a later case it was decided by Lord *Cottenham*, Chancellor, after a review of all the cases,⁴ that, where the portion was less than the legacy, the latter was only adeemed pro tanto.

¹ In *Pye, ex parte*, 18 Vesey, 140, 153.

² See also *Ward v. Lant*, Prec. in Ch. 182 ; *Jenkins v. Powell*, 2 Vern. 115 ; *Scotton v. Scotton*, 1 Str. 235 ; *Grave v. Salisbury*, 1 Br. C. C. 425 ; *Carver v. Bowles*, 2 Russ. & My. 301 ; *Montague v. Montague*, 15 Beav. 565.

³ *Hartop v. Whitmore*, 1 P. Wins. 681.

⁴ *Pym v. Lockyer*, 5 My. & Cr. 29. And from a consideration of all the cases upon this point, it seems to be regarded as mainly a question of presumptive intention whether a marriage portion shall adeem a legacy. In *Ex parte*

3. It has often been held, contrary to the established * presumptions in many analogous cases, that the presump- * 441 tion against double portions would not be repelled although it appeared that the limitations attached to the portion should vary essentially from those of the provision under the will.⁵ This point was considerably discussed in the case of *Wharton v. Durham*,⁶ and finally settled by the House of Lords.

4. But it has been held, the presumption of satisfaction will not arise, even in the case of a legacy, by an adequate portion, where the two are not ejusdem generis;⁷ or where the subsequent advancement depends upon a contingency, and the provision in the will is certain;⁸ or where the advancement is expressed to be in satisfaction of an interest to which the child is entitled, not under the will;⁹ or where the bequest to the child is of a residue, or some portion of the residue, in which case it is not regarded as a portion.¹⁰ And the principle of ademption, by subsequent portion, has not been applied to devises of real estate.¹¹

Dubost, 18 Vesey, 140, a portion of £3,000 to a natural daughter was held not to adeem a legacy of £5,000. And in *Watson v. Lord Lincoln*, Amb. 325, an advancement of £20,000 was held to adeem a provision by appointment under a will of £10,000. But see *Farnham v. Phillips*, 2 Atk. 215. In *Robinson v. Whitley*, 9 Vesey, 577, a marriage present of £500, saying they would want furniture, was held not to adeem any portion of a legacy of £1,000. But an advancement of £1,000 to a daughter upon her marriage was held to adeem a legacy in the father's will of the same amount. *Elkenhead's Case*, cited in 2 Vernon, 257; s. p. in *Tapper v. Chalcroft*, cited in 2 Atk. 492; *Ellison v. Cookson*, 2 Br. C. C. 307; s. c. 1 Ves. Jr. 100. The presumption against double portions and its force is discussed in *Sheffield v. Coventry*, 2 Russ. & M. 317. The doctrine of the text is maintained in *Dawson v. Dawson*, Law Rep. 4 Eq. 504; *Nevin v. Drysdale*, id. 517.

⁵ *Trimmer v. Bayne*, 7 Vesey, 508; *Ex parte Pye*, 18 Vesey, 140, 153; *Hartopp v. Hartopp*, 17 Vesey, 184; *Powys v. Mansfield*, 3 My. & Cr. 359.

⁶ 5 Sim. 297; on appeal in the House of Lords, where the decrees of *V. C. Shadwell*, and the Chancellor, Lord *Brougham*, were reversed. 10 Bligh, 526.

⁷ *Holmes v. Holmes*, 1 Br. C. C. 555; *Davys v. Boucher*, 3 Y. & Coll. Eq. R. 397, 411.

⁸ *Spinks v. Robins*, 2 Atk. 491. But see Lord *Cottenham's* remarks in *Powys v. Mansfield*, 3 My. & Cr. 359, 374, 375.

⁹ *Baugh v. Read*, 1 Ves. Jr. 257. But see Lord *Lyndhurst's* observations in *Durham v. Wharton*, 10 Bligh, 526, 546.

¹⁰ *Freemantle v. Bankes*, 5 Vesey, 79, 85; *Hall v. Hill*, 1 Dr. & W. 94, 119, by *Sugden*, Chancellor.

¹¹ *Davys v. Boucher*, 3 Y. & Coll. Eq. R. 397.

5. The question of the admissibility of parol evidence in cases of this kind, and the extent to which, and the purposes for which, it is to be received, was considered very much in detail in a recent case,¹² and the cases very carefully reviewed by Sir *James Wigram*, V. C., a judge of great learning, who has devoted much study to the elucidation of this special topic; and the conclusion to which he came was, that parol evidence was to be received in such cases, not for the purpose of affecting the will or its construction in any sense, but to establish an independent fact, the payment of a portion to the legatee, and the purpose for * 442 which it was done; viz., the satisfaction, or payment * in advance, of the whole of the provision under the will. In this view, and to this extent, there seems to us no more objection to receiving parol evidence than in the case of an alleged payment upon a promissory note, or of any other debt depending upon written evidence.

6. The learned judge further considered, that, if the advancement of the portion as well as the legacy were both given or made by written instruments, it was clear that no parol evidence could be held admissible upon any question of the construction of either instrument, or to show that the instruments were made with any further or different purpose or intent from that expressed in the writing; and that, in every instance where parol evidence was offered in cases of this character, the distinction between proving the revocation and ademption of the legacy was strictly to be regarded; and that in no case could the declarations of the testator be proved for the purpose of establishing his intention of adeeming the legacy in his will by means of subsequent portions advanced by him, except such declarations as he made at the time of making such advancements, and with a view to give character to the transaction.¹³

¹² *Kirk v. Eddowes*, 3 Hare, 509.

¹³ The learned judge referred to the following cases as bearing upon the question of receiving parol evidence: *Monck v. Monck*, 1 Ba. & Bea. 298; *Rosewell v. Bennett*, 3 Atk. 77; *Thellusson v. Woodford*, 4 Madd. 420; *Bell v. Coleman*, 5 Madd. 22; *Biggleston v. Grubb*, 2 Atk. 48; *Hoskins v. Hoskins*, Prec. in Chan. 263; *Chapman v. Salt*, 2 Vern. 646; *Powel v. Cleaver*, 2 Br. C. C. 499; *Grave v. Lord Salisbury*, 1 Br. C. C. 425; s. c. cited 18 Vesey, 152; *Ex parte Pye*, 18 Vesey, 140, where many of the foregoing cases are extensively commented upon. So also in *Hall v. Hill*, 1 Dr. & W. 94, the question is ably discussed by Sir *Edward Sugden*, when Chancellor of Ireland.

* 7. But although we feel the fullest confidence in the * 443 qualifications and limitations declared by two such experienced and learned judges as Sir *Edward Sugden* and Sir *James Wigram* upon this much-perplexed question of the extent to which parol evidence is admissible in cases of this character, and although we can see and feel the justice and reasonableness of the grounds upon which the matter is placed by them, we are not prepared to say that all the cases can be brought fairly into the precise categories declared by these able and learned jurists. There is very little question it ought to be so, in order to present this complicated portion of the law in a symmetrical form; but it certainly is not so at present. The question and the cases are very extensively reviewed by Mr. Roper;¹⁴ and the conclusion to which this learned writer comes seems to be,¹⁵ (1) that, upon the whole, the law may be considered as settled, that declarations made by the testator to any person, at any time, whether as part

Sir *James Wigram*, in the case of *Kirk v. Eddowes*, *supra*, comes very fully to the conclusion that parol evidence is to be received only for the purpose of disproving the presumption which the law attaches to the fact of giving a portion after the legacy; and having been received in contradiction, it may also be received in support of that presumption. This is the form in which the rule is stated in that class of cases where the portion is advanced by a distinct instrument in writing. "In such cases," says the learned judge, "the evidence is not admitted on either side for the purpose of proving, in the first instance, with what intent either writing was made, but for the purpose only of ascertaining whether the presumption which the law has raised be well or ill founded." *Hurst v. Beach*, 5 Madd. 351; *Hall v. Hill*, 1 Dr. & W. 94; *Hartopp v. Hartopp*, 17 Vesey, 184, 192; *Powys v. Mansfield*, 3 My. & Cr. 359. And this seems to be substantially the view taken of the cases, upon this and the analogous questions, in regard to the admissibility of parol evidence, by Prof. Greenleaf (3 Ev. § 366), where the learned author states, that where the law attaches a presumption to acts or instruments different from their natural import, as that repeating legacies was not intended to multiply the gifts, where they are given by the same instrument, and are of the same sum, parol evidence is receivable to contradict this presumption of law, and to show that the testator did mean what his words literally import; and, if admissible to contradict such presumption of law, it must equally be admissible to support the presumption after it has been thus contradicted. And a receipt from the legatee expressed to have received money towards a legacy hereafter to be given will adeem the legacy. *Upton v. Prince*, Cas. temp. Talb. 71. See also *Peacock's Estate*, L. R. 14 Eq. 236.

¹⁴ 1 Roper, 364-409.

¹⁵ *Ibid.* 408.

of the transaction of the advancement or not, are admissible in evidence upon the question of ademption; (2) that the declarations of the testator, made at the time of making the advancement, were of more value than if made at any other time, since the purpose of receiving any declaration was to determine the intent with which the advancement was made, and his declarations made at that time would more naturally show his intention at that time than if made subsequently; and (3) it is said by this writer, that declarations made after the advancement are of more value than those made before that event. But it seems to be admitted by him, that, according to one case,¹⁶ declarations made before the advancement were held of little account; and in another case,¹⁷

* 444 * declarations made afterwards were regarded as of little or no weight. The strongest case in the books, perhaps, in favor of the general admission of parol evidence to show the purpose of the testator, in all these analogous questions, and under all circumstances, is that of *Wallace v. Pomfret*,¹⁸ decided by Lord *Eldon*, Chancellor, to which we have already alluded.¹⁹

8. After occupying so much space upon the question of allowing parol evidence upon the presumptions affecting the satisfaction of debts by legacies, legacies by portions, and vice versa, with the other kindred or analogous presumptions, we scarcely feel justified in saying any thing more. But it seems to us the very able and perspicuous review and classification of the cases by Sir *Edward Sugden*²⁰ should be placed in a form to be more generally accessible to the profession than it can be in the reports, where comparatively few can reach it; and as our limited space precludes our publishing it at length, we have attempted a brief analysis of this portion of the opinion.

(1.) The first class is, where a legacy is claimed to have been adeemed by a portion subsequently advanced by the father, or one standing in the place of the father. Here the question of the advancement is one altogether inter vivos; and the fact, or the extent and purpose, of the advancement being made, where there is no writing, rests wholly in parol; and where there is a writing, parol

¹⁶ *Trimmer v. Bayne*, 7 Vesey, 508.

¹⁷ *Langham v. Sanford*, 17 Vesey, 435; s. c. 2 Mer. 23.

¹⁸ 11 Vesey, 542.

¹⁹ § 10, pl. 7.

²⁰ In *Hall v. Hill*, 1 Dr. & War. 94, 111-133.

evidence may be received in aid of the construction, to the same extent as in other cases. Of this class of cases are the following: ²¹—

(2.) That, where the presumption of law is according to the natural import of the words of the will, that cannot be contradicted by parol evidence, but only where the presumption is contrary to the primary and more obvious language of the instrument. This class of cases we have already discussed to some extent, and little more need be said.²²

* (3.) In the class of cases where the legacy comes last in * 445 the order of time, and where the claim is that it shall be construed or held a satisfaction of an existing debt, or a stipulated portion, it seems more difficult to admit parol evidence, without running counter to the best established principles upon the subject. Hence, in most cases of this character, the testimony has been rejected.²³

(4.) There is a class of cases where all the acts are testamentary, and the matter has to be settled by the construction of the instruments. In these cases it seems to be settled, that no parol evidence can be received to aid or control the legal construction.²⁴

9. We have thus given, in the briefest space possible, a very imperfect, but we hope an intelligible, analysis of the grounds upon, and the extent to which, parol evidence is admissible, in regard to the payment of debts by legacies, the ademption of legacies by portions, and the converse, and upon all the analogous questions; and the conclusion to which we feel compelled to come is, that, upon strict principle, the admission of this class of proof is

²¹ *Rosewell v. Bennett*, 3 Atk. 77; *Monck v. Lord Monck*, 1 Ball & B. 298.

²² *Freemantle v. Bankes*, 5 Vesey, 79; *Pole v. Lord Somers*, 6 Vesey, 309, where the cases are a good deal considered. See also *Shudal v. Jekyll*, 2 Atk. 516; *Debeze v. Mann*, 2 Br. C. C. 165; 1 Cox, 346; *Trimmer v. Bayne*, 7 Vesey, 508; *Wallace v. Pomfret*, 11 Vesey, 542; *Hurst v. Beach*, 5 Madd. 351. There are also some other cases which seem to have been decided partly upon the principle of the preceding cases, but chiefly without much regard to the principles governing the admission of parol evidence in connection with written instruments. *Weall v. Rice*, 2 Russ. & My. 251, 263; *Booker v. Allen*, id. 270; *Lloyd v. Harvey*, id. 310.

²³ *Fowler v. Fowler*, 3 P. Wms. 353; ante, pt. 1, § 39.

²⁴ *Coote v. Boyd*, 2 Br. C. C. 521; *Osborne v. Duke of Leeds*, 5 Vesey, 369.

reduced to very narrow limits, but that, in practice, it has hitherto taken a much wider range.

10. It seems entirely well settled, that the same presumption in favor of the ademption of a legacy by a subsequent portion will apply where the person advancing the same stands in the place of a father, as if he were actually the father.²⁵ This point is considerably discussed by Lord Chancellor *Cottenham*, in the case of *Powys v. Mansfield*,²⁶ and the points declared, that the proper definition of a person in loco parentis to a child is one who means to put himself in the situation of the lawful father of the child, with reference to the father's office and duty of making a provision for the child. A person may stand in this relation to the child, notwithstanding the child lives with and is maintained by the father.

11. The existence of this relation must of necessity be shown by parol evidence; and for this purpose it is competent to prove the acts and declarations of the person claimed to have assumed it, in relation to it.²⁶

* 446 * 12. But where the person giving the portion as well as the legacy is not in law recognized as the father, the child being illegitimate, and nothing appearing to show that the testator intended to assume the position of father, as before stated, the courts have held that no presumption of satisfaction of the legacy arises.²⁷ Sir *William Grant*, M. R., here gives a very satisfactory exposition of this portion of the subject. It seems clear, that, to come within the rule, the donor must be either the father of the legatee, or have voluntarily assumed that relation, and the first gift must have been in the nature of a portion. But even where the testator stands in the relation of a stranger, or other relative besides the father, if the legacy was given for a particular purpose, and the testator advances money for the same purpose,²⁸ or where it appears in any legal manner that it was the intention of the testator to have the legacy adeemed, that construction will be adopted.

13. It would seem that no relation will of itself be sufficient to place one in loco parentis, unless the actual relation exists, or the person voluntarily assumes the relation. But it is obvious that

²⁵ *Twining v. Powell*, 2 Coll. C. C. 262.

²⁶ 3 My. & Cr. 359.

²⁷ *Wetherby v. Dixon*, 19 Vesey, 407.

²⁸ *Debeze v. Mann*, 2 Br. C. C. 165; *Monck v. Monck*, 1 Ball & B. 298, 303.

much less testimony would be required to establish that assumed relation between grandparents and their grandchildren, especially where the father of the children had deceased, or become incompetent to discharge that office; or in the case of uncle, and nephew or niece; or in the case of the putative father, who recognized the natural tie,—than in the case of mere strangers; but none of these relations, in themselves, have been regarded as sufficient to sustain the presumption of ademption.²⁹

14. The question of the ademption of portions by legacies was a good deal considered in a late case before the House of Lords;³⁰ and it was there declared, that the presumption of law is against double portions; and that where a sum of money is given by the will of the parent to a particular child, and a like sum is afterwards secured by a settlement on the marriage of that child, there is a * presumption in favor of the ademption of the legacy; * 447 but this presumption may be rebutted by evidence of intention to the contrary. The burden of proof of intention is on the person claiming the double portion. It is not necessary the legacy should be paid in order that it may be adeemed.

15. Substitutionary legacies, that is, where legacies are subsequently given to come in the place of others given before, either in a former will, or where the substitutionary legacies are given in a codicil executed at a later date than the instrument by which the legacies were given in the first instance,—in all cases, such substitutionary legacies, unless there is something in the terms used or the circumstances attending the substitution to the contrary, will have all the incidents, conditions, and limitations attaching to the original legacies.³¹

16. The American courts fully recognize the presumption against

²⁹ *Shudal v. Jekyll*, 2 Atk. 516, 518; *Powel v. Cleaver*, 2 Br. C. C. 499, 517, 518; *Roome v. Roome*, 3 Atk. 181; *Perry v. Whitehead*, 6 Vesey, 544; *Lyddon v. Ellison*, 19 Beav. 565; *Grave v. Lord Salisbury*, 1 Br. C. C. 425; *s. p. Pankhurst v. Howell*, 6 Ch. App. 136. *James*, Lord Justice, citing *Mr. Justice Williams*, 2 Ex'rs, 6 Ed. 1240.

³⁰ *Hopwood v. Hopwood*, 7 Ho. Lds. Cas. 728. See also *Montefiore v. Guedalla*, 1 DeG., F. & J. 93, where the question of the ademption of a portion of the residuary bequest to a son, by a subsequent advance by way of settlement on the son's marriage, is considered. *Meinertzen v. Walters*, L. R. 7 Ch. App. 670.

³¹ *Duncan v. Duncan*, 27 Beav. 386.

double portions.³² But the presumption is not applied where the portion and legacy are not ejusdem generis,³³ or where the bequest is of an uncertain amount.³² Parol evidence is admissible, upon the question of intention, in all cases where the act claimed as an ademption rests in oral proof.³⁴ General legacies not charged upon land held adeemed by sale of all testator's personalty; and the notes for the purchase-money made payable to the several legatees, and deposited with the will, held to belong to such legatees.³⁵

17. A delivery of the specific thing bequeathed to the legatee during the life of the testator, or the payment of a general legacy by him, will, of course, adeem or extinguish the legacy in either case; and where any doubt exists in regard to the intention of the testator to part with the entire dominion and property in the one case, or in the other to have it operate as a payment or extinguishment by anticipation, it must be solved, as in other cases, by the triers of the facts.³⁶

18. Where the testator, by will dated Dec. 17, 1862, gave his wife a legacy of £200, to be paid within ten days after his decease, and on the 28th of November, 1867, during his last illness, at the request of his wife, who was ignorant of the legacy, gave her £200, that she might have a sum of money at her control immediately on his death, it was held no presumption would arise that the gift should adeem the legacy. Lord Justice *James* here cites with approbation the rule laid down in *Williams' Executors*,³⁷ that where the testator is neither a parent, or in loco parentis, the legacy must be regarded as bounty, and will not be adeemed by subsequent advancement, unless the legacy is given for some specific purpose which is fully answered by the subsequent advancement by the testator.³⁸

19. And where power is given by will to charge a certain proportion of the residuary estate in favor of the same persons already

³² *Clark v. Jetton*, 5 Sneed, 229; *Rogers v. French*, 19 Ga. 316.

³³ *Shaw*, Ch. J., in *Paine v. Parsons*, 14 Pick. 318, 320. Thus where the father, in his lifetime and after the date of his will, gave his son real estate, it was held no ademption of a pecuniary legacy in the will. *Dugan v. Hollins*, 4 Md. Ch. Decis. 139; s. p. in *Swoope's Appeal*, 27 Penn. St. 58.

³⁴ *May v. May*, 28 Ala. 141; *Duckworth's Ex'rs v. Butler*, 31 id. 164.

³⁵ *Logan v. Deshay*, Clarke, Ch. 209.

³⁶ *Clayton v. Akin*, 38 Ga. 320.

³⁷ *Williams' Ex'rs*, 381.

³⁸ *Pankhurst v. Howell*, L. R. 6 Ch. App. 136.

entitled to a certain specified amount, to be raised out of the same estate, it was held by Lord Chancellor *Selborne*, sitting at the Rolls, that the latter charge, being of, or not exceeding, a certain proportion of the income of the residue, could not be regarded as adeeming the definite sum already charged on the residue in favor of the same persons.³⁹

20. The payment by the wife's father of £1,000 to his daughter's husband, expressed to be his daughter's portion, was held to be no satisfaction of any part of the sum which the father had given her by his will previously executed.³⁹ But where the father covenanted to pay to the trustees of the marriage settlement of his daughter and her husband £4,000 during his lifetime, or within two years after his decease, it was held to be in satisfaction of so much of his daughter's portion under the will.³⁹

21. The question of the ground of presuming the ademption of legacies from subsequent gifts as between parent and child, or those in quasi relation of parent and child, is extensively discussed in a recent English case,⁴⁰ and the former cases carefully reviewed, with the general result, that presumptively the gift will adeem the legacy, unless there is something satisfactorily to explain the gift upon other grounds. The burden of proof is upon those who claim this view to render it acceptable to the mind of the court. But this rule will not apply unless the parties stand in the actual or quasi relation of parent and child.⁴¹

* SECTION III.

* 448

THE PAYMENT AND ABATEMENT OF LEGACIES.

1. All valid legal claims against testator take precedence of legacies.
2. The executor may retain the assets, against legatees, in favor of contingent claims.
3. Creditors may pursue the assets into the hands of legatees.
4. No excuse for not paying debts, that the assets paid out without knowledge of the debt.

³⁹ *Cooper v. Macdonald*, 21 W. R. 833; *Hindle v. Taylor*, 5 DeG., M. & G. 577, distinguished.

⁴⁰ *Leighton v. Leighton*, L. R. 18 Eq. 458.

⁴¹ *Fowkes v. Pascoe*, L. R. 10 Ch. App. 343.

5. In the United States, all debts required to be presented within a short time limited.
6. Where debts discovered after some legacies paid in full, they must contribute.
7. How far specific and demonstrative legacies abate. Specific legacies paid next after debts.
8. General legacies next; and finally the residuary bequests.
9. It has been attempted to allow the residuary legatee to come in as a general legatee in case of a devastavit. But this view seems not maintainable.
- 10, and n. 25. Those legacies given in satisfaction of a subsisting legal claim take precedence.
11. Instances where apparent considerations not held sufficient.
12. The meritorious character of the legatee, or the conjecture of testator's intention, will not exempt legacies from abatement.
13. Instances where it has been, or has not been, held that general legacies were entitled to priority.
14. The rule in New York as to contributions to make up the share of a child born after the making of the will.
15. Slaves bequeathed liberty, how made to contribute.
16. An executor cannot invest the estate in New York, unless in the stocks of the state, or on real-estate security.
17. Estates invested in Confederate securities, which became worthless on the suppression of the Rebellion, must be settled on the basis of United States currency.

§ 28. 1. It seems to be well settled that all debts, even those of a mere voluntary character, if by bond or sealed instrument, so as to be valid without consideration, must be paid before any legacy can be paid.¹ And although, as before stated, a specific legacy is payable in preference to general legacies, they must both yield to any valid legal claim existing against the testator at the time of his decease.

2. It seems, finally, after considerable discussion and fluctuation in the opinions of the courts, to be settled, that the executor may retain the assets upon a contingent bond, or other claim against the estate, and is not obliged to part with them to legatees * 449 unless * fully indemnified against such contingent claims.²

And while it is said that the executor is bound to pay over the assets to the legatee upon receiving indemnity against the contingent claim,³ it has also been held that if the executor does part with the assets without such indemnity, or impounding suffi-

¹ *Lomas v. Wright*, 2 My. & K. 769; 2 Wms. Ex'rs, 914.

² *Nector v. Gennet*, Cro. Eliz. 466; s. c. *Moore*, 418, *Eeles v. Lambert*, Aleyn, 38; *Hawkins v. Day*, Amb. 160; *Simmons v. Bolland*, 3 Mer. 547; *Vernon v. Egmont*, 1 Bl. N. s. 554.

³ *Higgins v. Higgins*, 4 Hagg. 242.

cient to meet such contingent claim, he must answer the same *de bonis propriis*, if it should become absolute.⁴

3. The old practice was for the executor to require of the legatees security against all debts, when he paid them the amount of their legacies.⁵ But that practice is now discontinued in England, and never existed in America. Hence, upon the basis of the existence of a trust in regard to the personal assets in the hands of the executor, in favor of creditors, they have been allowed to pursue them into the hands of legatees.⁶

4. It has sometimes been made a question, how far the executor or administrator remained liable upon debts not made known to him within the first year of his office, and after he had paid over all assets in his hands to the legatees or distributees, *bona fide* believing that no further debts against the estate existed.⁷ But the more recent cases seem to establish the proposition that the payment of legacies is no excuse for the non-payment of debts, even where they were not made known to the executor.⁸

* 5. But in the United States generally, if not univer- * 450
sally, the executor, by giving general public notice in the form prescribed by statute, may compel the presentation of all claims against the estate, within a short period limited by the statute, under penalty of being for ever thereafter precluded from enforcing the same against the estate. In this mode an easy way

⁴ *Cochrane v. Robinson*, 11 Sim. 378; *Fletcher v. Stevenson*, 3 Hare, 360, 370; post, pt. 3, § 38, pl. 5. But the executor, who is also residuary legatee, cannot recover of a specific legatee for expenses incurred after assenting to his legacy, without demanding a refunding bond, especially where he has received more than the entire amount of the expenses as residuary legatee. *White v. Easters*, 38 Al. 154.

⁵ *Chamberlain v. Chamberlain*, 1 Ch. Cas. 256.

⁶ Lord *Hardwicke*, in *Hawkins v. Day*, Amb. 803; *March v. Russell*, 3 My. & Cr. 31, 42; post, § 29.

⁷ *Chelsea Water-Works v. Cowper*, 1 Esp. N. P. C. 275.

⁸ *Norman v. Baldry*, 6 Sim. 621; *Smith v. Day*, 2 M. & W. 684; *Knatchbull v. Fearnhead*, 3 My. & Cr. 122; *Hill v. Gomme*, 1 Beav. 540; *Davis v. Blackwell*, 9 Bing. 5. In this last case *Tindal*, Ch. J., said, that a great lapse of time before the debt was called for might exonerate the executor, where he had paid all the assets to legatees. And in *Richards v. Browne*, 3 Bing. N. C. 493, the same learned judge said, that if the executor was induced to part with the assets by reason of any neglect, or of any act or declaration of the creditor, such creditor could not compel him to make good the deficiency thus created.

of escape from all questions in regard to the executor's knowledge of debts against the estate is provided; and, if the executor fails to avail himself of this method of protecting himself against stale claims, he must expect the courts will leave him to such legal defences as he may be able to avail himself of.

6. It would seem, where part of the estate has been already distributed among the legatees, leaving another portion to meet the remaining legacies, and a debt is then first established, that only a proportionable part of the debt will be paid out of the fund remaining in court or in the hands of the executor, and the remainder be paid ratably by the other legatees who had been paid the full amount of their legacies.⁹

7. The abatement of legacies seems proper to be considered here. It has been before sufficiently intimated, that, after the payment of all valid legal obligations existing against the testator at the time of his death, the specific legacies must be next delivered to the legatees, or to those entitled to receive them on their account. Specific legacies are not to be abated on account of general legacies,¹⁰ unless such general legacies are specially made a charge upon the specific legacies or upon the personal estate, and there is no other upon which it can rest.¹¹ We have already shown how far demonstrative legacies are subject to abatement.¹²

8. In regard to general legacies, if any thing remain, after meeting all debts and the specific legacies, it must be applied upon them, in proportion to their amount, until they are fully paid.¹³ The chief controversy which is likely to arise, in re-

⁹ *Gillespie v. Alexander*, 3 Russ. 130; *Greig v. Somerville*, 1 Russ. & My. 338; *David v. Frowd*, 1 My. & K. 210; post, § 29.

¹⁰ *Clifton v. Burt*, 1 P. Wms. 678.

¹¹ *Sayer v. Sayer*, Prec. in Ch. 392; *White v. Green*, 1 Ired. Eq. 45. See also *Biddle v. Carraway*, 6 Jones, Eq. 95.

¹² Ante, § 7, pl. 18.

¹³ 2 Wms. Ex'rs, 1223; *Mollan v. Griffith*, 3 Paige, 402. In a recent English case, *Miller v. Huddleston*, Law Rep. 6 Eq. 65, where five thousand pounds were appointed on certain trusts, subject to a power of appointment as to one thousand pounds, the fund amounting to only one thousand pounds, it was held that the appointee of the one thousand pounds and the persons entitled to the residue of the fund must abate proportionally. But where a definite sum is given to trustees with directions to pay two sums out of it, and the residue to another, these are all definite legacies, and, in case of abatement, must abate in proportion to the several proportions of the sums given to each legatee. *Baker v. Farmer*, Law Rep. 4 Eq. 383. But, on appeal, the Lords-

gard * to the abatement of general legacies, will more * 451 commonly occur in regard to residuary bequests, or those claimed to be such. It is clear that a strictly residuary bequest must defer to all general legacies and annuities, and can only be paid after all such claims are satisfied.¹⁴

9. It has sometimes been held, where the state of the property of an estate, at the time of the decease of the testator, is such, that a certain amount clearly accrues to the residuary legatee, and the executor afterwards wastes the estate, so that there does not remain sufficient to pay the general legacies, that the residuary legatee was entitled to be reckoned the same as a general legatee, to the extent of the funds in the executor's hands, so that the devastavit shall fall proportionately upon those interested in the assets.¹⁵ But this general view was strenuously dissented

Justices held on the words of the will, as some other property was coupled with this definite sum, and the legatees had not consented to the division of this definite sum, that the particular legacies were first entitled to payment; the residuary legatee only to what should then remain.

¹⁴ *Purse v. Snaplin*, 1 Atk. 414; *Fonnereau v. Poyntz*, 1 Br. C. C. 472; *Croly v. Weld*, 3 DeG., M. & G. 993. Annuities stand upon the same footing as legacies in regard to abatement, and are to be reduced to their present value in order to determine the rate of abatement. *Croly v. Weld*, 3 DeG., M. & G. 993, 996. But questions of considerable importance often arise in regard to whether an annuity is payable out of the corpus of an estate, or only out of the income. *Miller v. Huddleston*, 17 Sim. 71; s. c. 3 M. & G. 513; *Wright v. Callender*, 2 DeG., M. & G. 652; *Haynes v. Haynes*, 3 DeG., M. & G. 590; *Bague v. Dumergue*, 10 Hare, 462; *Miner v. Baldwin*, 1 Sm. & G. 522. In a late English case it is said, when there is a deficiency of assets to be assessed upon the legacies and annuities, the latter are to be valued as of the time when the deficiency began. *Street v. Street*, 8 Law T. N. s. 306. Annuities given by will are to be regarded as legacies, unless there are special reasons to regard them otherwise. *Ward v. Grey*, 26 Beav. 485. But "residue" is not a legacy in the ordinary sense of the term, though the person taking it is called a residuary legatee. *Ib.*

¹⁵ *Dyose v. Dyose*, 1 P. Wms. 305; *Ex parte Chadwin*, 3 Swans. 380. And where a specific fund is so disposed of as to clearly indicate that the testator, in giving the residue, expected it would amount to a particular sum, but which is not named, the form of the bequest being the residue of the fund, such legatee cannot claim to stand as a general legatee, and thus only suffer proportionally with other legatees in any depreciation or loss of the fund, but must bear the whole loss. *Harley v. Moon*, 1 Drew. & Sm. 623. The residuary estate must bear the burden of the payment of the debts, although a portion of it is so devised as not to take effect, and, in consequence, goes to the next of kin. *Scott v. Forristall*, 5 Law T. N. s. 709.

* 452 from * by Lord *Thurlow*, Chancellor,¹⁶ and this dissent confirmed by Sir *William Grant*, M. R. ;¹⁷ and it would seem, that, unless the general legatees had so conducted as to countenance the course of conduct in the executor which resulted in the devastation, there could be no claim to postpone them to any payment to be made to the residuary legatee. They are entitled to priority and preference over the residuary legatee, under all circumstances, and as to every portion of the estate. We do not readily comprehend, therefore, how their claim can be, in any respect, or under any circumstances, placed upon an equality with that of the residuary legatee.

10. It seems that although all general legacies, as a general rule, will abate, proportionally, in case of any deficiency of assets, this will not apply to legacies founded upon any valid consideration, as the relinquishment of a debt, or of a claim of dower.¹⁸ In such cases the legacy will be paid in full before any thing will be paid upon the other general legacies.¹⁸ We cannot see how this distinction in regard to the abatement of general legacies can be maintained, unless the latter class alluded to are placed upon the ground of being quasi debts ; and, if so, it would seem they should take precedence of specific legacies even. But be that as it may, it seems they will, at all events, have precedence of general legacies.

* 453 * 11. But where a legacy is given to one with whom the testator had a current account, upon condition of his executing a release of all demands against the estate, which he did, it not appearing whether any debt was due him, and a deficiency in the assets accrued, it was held he could not be regarded as standing in the light of a purchaser of his legacy, until it was made to appear

¹⁶ In *Fonnereau v. Poyntz*, 1 Br. C. C. 478 ; *Humphreys v. Humphreys*, 2 Cox, 184.

¹⁷ In *Page v. Leapingwell*, 18 Vesey, 463.

¹⁸ *Burridge v. Bradyl*, 1 P. Wms. 126 ; *Blower v. Morret*, 2 Ves. Sen. 420 ; *Davenhill v. Fletcher*, Amb. 244 ; *Norcott v. Gordon*, 14 Sim. 258. This distinction is maintained in *Dey v. Dey*, 4 C. E. Green, 137, on the ground of the evident intent of the testator as gathered from the will. And it is also maintained in *Clayton v. Akin*, 38 Ga. 320, on the ground that the wife in such cases takes as a quasi purchaser. But it was held in this case that the same rule could not be applied to a legacy to the executor as compensation for his services.

that some debt was due him.¹⁹ So legacies given to those creditors with whom compromises had been made, at less than the full amount of their claims, are not regarded as upon consideration.²⁰ So, where the testator bequeaths money to pay the debts of a friend or relative, it is regarded as a mere gratuity, and standing the same as any other general legacy.²¹

12. Legacies given to particular persons for specified objects, as to executors for their care and trouble,²² or sums of money for mourning-rings,²³ or to servants, or to charities,²⁴ have no pre-eminence over other general legacies, in regard to the matter of abatement. Nor will the meritorious character of the legatee, being the testator's wife or child, make any difference in regard to the question of abatement, however certain it may appear, as matter of general conjecture, that the other legacies would not have been made by the testator, except upon the expectation on his part that his estate would be sufficient to meet them all; and that, if he had entertained the slightest apprehension of any deficiency, he would have provided that it should fall upon the legacies subsequently named.²⁵

¹⁹ *Davies v. Bush*, 1 Younge, 341.

²⁰ *Coppin v. Coppin*, 2 P. Wms. 291.

²¹ *Shirt v. Westby*, 16 Vesey, 393.

²² *Fretwell v. Stacy*, 2 Vern. 434; *Attorney-General v. Robins*, 2 P. Wms. 23; *Heron v. Heron*, 2 Atk. 171; *Duncan v. Watts*, 16 Beav. 204; *Read v. Strangways*, 14 Beav. 139.

²³ *Apreece v. Apreece*, 1 V. & B. 364. A legacy for a monument has been exempted from abatement. *Masters v. Masters*, 1 P. Wms. 421. But this case has been questioned. *Blackshaw v. Rogers*, 4 Br. C. C. 349, where a legacy given to keep a monument in repair was held liable to abate.

²⁴ *Attorney-General v. Robins*, 2 P. Wms. 23.

²⁵ *Blower v. Morret*, 2 Ves. Sen. 420; Lord *Truro*, Chancellor, in *Miller v. Huddleston*, 3 M. & G. 513, 526-529. The same rule prevails in Pennsylvania. *Duncan v. Alt*, 3 Penn. 382; *Loomis's Appeal*, 10 Penn. St. 387; *Cryder's Appeal*, 11 Penn. St. 72. In the case of *Duncan v. Alt*, supra, *Gibson*, Ch. J., said: "A pecuniary legacy may undoubtedly be exempt from abatement, as in the case of a wife or child destitute of other provision, or of a legacy given in lieu of a dower, or of a preference manifestly intended. But these cases are few in number, dependent on peculiar circumstances, and attended with strong expressions of intention." This seems very just in its general bearing; but the first specification here made seems not maintainable, as stated in the text, and as was held in *Jett, Ex'r, v. Bernard*, 3 Call, 11, which proves the extreme difficulty of giving a specific definition upon the point. There may be some statute in Pennsylvania justifying the exemption first

* 454 * 13. Prima facie the testator must be presumed to intend that all his legacies shall be paid *pari passu*, and the onus is upon any one claiming priority. But where two legacies were given in the form of interest or annuities, with the express provision that after the death of the legatees the principal sum should revert to the estate, and become applicable to the payment of legacies given by the will, this was held sufficient to give such legacies priority over the others.²⁶ And in all cases, where by the express

named by the learned chief justice; otherwise it is clearly not maintainable. The subject is very extensively and learnedly discussed in *Loomis's Appeal*, *supra*. The rule of exempting a legacy to the wife from contribution to a deficiency, in common with other legacies, seems to have obtained in England at one time certainly. *Lewin v. Lewin*, 2 Ves. Sen. 415; *Burridge v. Bradyl*, 1 P. Wms. 127. It is the duty of the executor to retain assets sufficient for the payment of debts, and, where debts unexpectedly come in after payment to the legatees, to recall enough to meet such debts. *Ticknor v. Harris*, 14 N. H. 272, 285. As before stated, specific legacies do not abate unless where all the personal estate is specifically bequeathed and a portion is required for the payment of debts, or of general legacies made a charge upon the estate specifically bequeathed, either in terms or in construction of law. *White v. Beattie*, 1 Dev. Eq. 320. And it seems to be considered in North Carolina, that where a general legacy is given, all the personal estate being specifically bequeathed, that will create a charge upon the specific legacies. *White v. Green*, 1 Ired. Eq. 45. But this proposition seems questionable. It seems to be well settled that legacies founded upon consideration, as where given and accepted in lieu of dower, or of the widow's distributive share, where she might waive the provisions of the will, cannot be subjected to abatement in common with other general pecuniary legacies. *Hubbard v. Hubbard*, 6 Met. 50; *Pollard v. Pollard*, 1 Allen, 490; *Towle v. Swasey*, 106 Mass. 100. But a legacy to the testator's sister, partly induced by a desire to reward her for the care of their mother, he having told her she would be remembered in his will, on that account was held not entitled to preference in payment. *Ib.*; *Williamson v. Williamson*, 6 Paige, 298; *Wood v. Vandenberg*, 6 Paige, 277. In this last case it was held that a legacy of piety, as for the erection of head-stones at the graves of the testator's parents or other near relatives, will not abate with other pecuniary legacies; but in this particular case the legacy was in the nature of a debt, the testator having bound himself to maintain his parents. It seems questionable how far a legacy of this kind, which is a mere gratuity, is exempt from abatement. A legacy of income for the support and education of an adopted son was held, upon the construction of the will and the probable intent of the testator, entitled to payment in full prior to general legacies; but the principal sum, payable upon his reaching majority, was considered not entitled to any such preference. *Towle v. Swasey*, *supra*.

²⁶ *Brown v. Brown*, 1 Keen, 275.

words of the will it is fairly to be inferred that the testator intended to give some of the legacies priority in regard to payment, they must * first be paid.²⁷ As where the testator, after * 455 giving several legacies, "at the latter end of his will said, that he apprehended there would be a considerable surplus of his personal estate beyond what he had before given away in legacies, for which reason he gave several further legacies," and afterwards, by a codicil, gave other legacies, and there occurred an unexpected deficiency, it was held that the legacies given at the close of the will and in the codicil should be postponed to those before given.²⁸ But general directions that the legacy to the testator's wife shall be paid immediately after his death, out of the first moneys that shall be received by the executor, was held not sufficient to exempt the legacy from abatement in common with the others.²⁹ So where legacies are given with the common language of wills, "imprimis," or "in the first place," "item," or "secondly," &c., it will create no priority in regard to exemption from abatement, but all must abate proportionally.³⁰ So where the testator directs his executors and trustees, after the payment of his debts, in the next place to pay three pecuniary legacies, and afterwards to raise and set apart three other legacies, it was held that the first class could not claim priority in regard to payment, but all must abate alike.³¹

14. Under the provision of the New York Revised Statutes, giving to a post-testamentary child the same portion of the real and personal estate of the father as if he had died intestate, all the devisees and legatees must contribute ratably, according to the value of their respective bequests, to supply the distributive share of such child. And even a legacy to the widow in lieu of dower is not exempt from such contribution.³²

15. During the existence of slavery in this country, where

²⁷ *Lewin v. Lewin*, 2 Ves. Sen. 415; *Marsh v. Evans*, 1 P. Wms. 668.

²⁸ *Attorney-General v. Robins*, 2 P. Wms. 23.

²⁹ *Blower v. Morret*, 2 Ves. Sen. 420. ³⁰ *Brown v. Allen*, 1 Vern. 31.

³¹ *Beeston v. Booth*, 4 Madd. 161. See also *Thwaites v. Foreman*, 1 Coll. C. C. 409; *Creed v. Creed*, 1 Dr. & War. 416; s. c. 11 Cl. & Fin. 491; *Ashburnham v. Ashburnham*, 16 Sim. 186; *Miller v. Huddleston*, 17 Sim. 71; s. c. 3 M. & G. 513; *Lord Dunboyne v. Brander*, 18 Beav. 313; *Eavestaff v. Austin*, 19 Beav. 591; *Haynes v. Haynes*, 3 DeG., M. & G. 590.

³² *Mitchell v. Blain*, 5 Paige, 588. As to how far devisees are liable to contribute to the payment of debts in this state, see *Stuart v. Kissam*, 11 Barb. 271.

* 456 slaves * were bequeathed their liberty, it was held a specific bequest, and they were only held to contribute to supply a deficiency for the payment of debts after all the other property was expended. And this was effected, not by their sale, but by hiring them out on shares, and applying the wages.³³

16. Where the executors were by the will intrusted with the investment of the estate for the benefit of the heirs, and accordingly invested it in state stocks other than New York, and railway and bank stocks, and railway mortgage-bonds, it was held the legatees were not obliged to accept such securities with the income in payment of legacies, the discretion of the executors not extending to such investments; the law of that state requiring the investment by trustees to be in the stocks of that state or on real-estate security, unless where express direction is given by the will.³⁴

17. Some nice questions have arisen in those states which were in rebellion at the time of the decease of testators, and whose estates were invested in Confederate securities, which were current to some extent at the time, but, upon the surrender, immediately became worthless. In North Carolina it has been held in such cases that the legacies are payable in United States currency.³⁵

SECTION IV.

REFUNDING OF LEGACIES, AND THE RIGHT OF LEGATEES TO FOLLOW THE ASSETS.

1. Where the executor volunteers to pay a legacy, he cannot recall it.
2. But it may be so recalled in all cases by creditors.
3. And it will make no difference that the money was paid the legatees under the sanction of the Court of Chancery.
4. One legatee unpaid has no equity to compel paid legatees to contribute to him, unless the executor has become insolvent.
5. If the assets are sufficient to pay all the legacies, those first paid cannot be compelled to contribute to make up a deficiency caused by the executor's wasting the assets. But it is otherwise where the assets were originally insufficient.

³³ *Harry v. Green*, 9 *Humph.* 182.

³⁴ *King v. Talbot*, 50 *Barb.* 453; s. c. affirmed, 40 *N. Y.* 76, where the Court of Appeals held that trust-funds must be invested upon real estate, or in national stocks or those of that state.

³⁵ *Barham v. Gregory*, 1 *Phillips, Eq. (N. C.)* 243; *Donnell v. Donnell*, id. 148.

6. The legatee will not be charged with interest unless he has received interest.
7. The legatees or creditors cannot follow the assets into the hands of a bona fide purchaser.
- * 8. The executor may mortgage the assets to raise money for the settle- * 457
ment of the estate.
9. The purchaser, who acts bona fide, not bound to see to the application of purchase-money.
- 10, and n. 15. The creditors and legatees may follow the assets, where the purchaser was cognizant of the executor's misapplying them.
11. Rights barred by lapse of time and acquiescence.
12. Trust-funds misapplied may be pursued into the hands of legatees and next of kin.
13. Where the specific devisee of land loses it by the default of the executor in not paying debts, he may recover upon the executor's bond.

§ 29. 1. It seems to be settled by all the decided cases, that where the executor volunteers to pay the whole or any portion of a legacy, and it subsequently appears that the assets are not sufficient to justify a payment to that extent, the loss must fall upon the executor, and he cannot compel the legatee to refund.¹

2. But if the payment were made by compulsion, as by decree of court, the executor, it is said in one case,² might have compelled the legatee to refund, upon a deficiency of assets appearing. But it is evident that could not be done, except upon a rehearing in the case where the decree passed. But it seems to be agreed, where a deficiency of assets to meet debts appears, that any overpayment to the legatees may be called back by the executor, by means of a bill in equity.³

¹ *Coppin v. Coppin*, 2 P. Wms. 291, 296; *Orr v. Kaines*, 2 Ves. Sen. 193; *Keylinge's Case*, 1 Eq. Cas. Ab. 239, pl. 25; 1 Roper, 456, 457. See also *Donnell v. Cooke*, 63 N. C. 227.

² *Newman v. Barton*, 2 Vern. 205.

³ *Newman v. Barton*, supra; *Nelthrop v. Hill*, 1 Ch. Cas. 135; *Davis v. Davis*, 8 Vin. Ab. 423, pl. 35, tit. Devise; *Noel v. Robinson*, 1 Vernon, 90; *Anon.*, 1 Vern. 162. See *Burnley v. Lambert*, 1 Wash. Va. 308. But the legatees who have been paid are not liable to an action to refund so long as there are still assets unappropriated sufficient to pay debts. *Doriocourt v. Jacobs*, 1 La. Ann. 214. And a residuary legatee cannot be compelled by a general legatee to refund unless there was an original deficiency of assets, so that the payment to the residuary legatee was a devastavit when made. *Demere v. Scranton*, 8 Ga. 43. See also *Scott v. Halliday*, 5 Munf. 103; *Sampson v. Bryce*, id. 175; *Harvey v. Steptoe*, 17 Gratt. 289; *Peterson v. Peterson*, Law Rep. 3 Eq. 111. In an administration suit in equity by a residuary legatee, the court has jurisdiction to compel the plaintiff to refund assets paid him by the executor before the bringing of the suit, for the purpose of paying pecuniary legatees who are not parties to the suit. *Prowse v. Spurgin*, Law Rep. 5 Eq. 99.

3. And in one case⁴ where payments had been made upon * legacies under the sanction of the Court of Chancery, and a fund in court had been apportioned among other legatees, it was held that a creditor, who had subsequently obtained permission to prove his debt, might go against the fund remaining in court, to the extent of the proportion of those legacies to the whole amount of legacies given by the will.

4. It is said, as a general rule, one legatee has no equity to compel another legatee to refund in order to pay his legacy, either in whole or in part, since the executor, by paying one legacy in full or in part, thereby admits assets in his hands sufficient for the payment of all the legacies.⁵ But it is regarded as an exception to this general rule if the executor be insolvent, so that the unsatisfied legatee can have no remedy against him, as he would be without all remedy unless he could obtain it in this mode.⁶

5. It has been considered, that if the assets are sufficient to meet all the legacies, and some of the legatees obtain full payment of the executor, who subsequently wastes the assets, so that there is not sufficient to pay all the legacies in full, the other legatees cannot compel the former to contribute to make up their loss, since the payment to them was no devastavit in the executor, and the maxim, *vigilantibus, non dormientibus, jura subserviunt*, applies. But if the assets had originally been deficient to answer all the legacies, and one or more legatee receive his full legacy, since this is a devastavit, or misapplication of the assets, equity will compel the legatees thus overpaid to contribute to make up the deficiency thus created by the payments to others; and this distinction seems entirely reasonable, and founded in justice.⁷

⁴ *Gillespie v. Alexander*, 3 Russ. 130. See also *Willmott v. Jenkins*, 1 Beav. 401; *March v. Russell*, 3 My. & Cr. 31; *Knatchbull v. Fearnhead*, id. 122; *Underwood v. Hatton*, 5 Beav. 36.

⁵ *Noel v. Robinson*, 1 Vern. 90, 94; *Orr v. Kaines*, 2 Ves. Sen. 193; *Gillespie v. Alexander*, 3 Russ. 130.

⁶ 1 Roper, 459; *Orr v. Kaines*, 2 Ves. Sen. 193. See *Davis v. Newman*, 2 Rob. Va. 664.

⁷ *Anon.*, 1 P. Wms. 495; *Walcott v. Hall*, 2 Br. C. C. 305. See also *Noel v. Robinson*, 1 Vern. 90. And in a recent case, before the Court of Chancery Appeal (*Fenwick v. Clarke*, 6 Law T. N. s. 593), where some legatees were to be paid immediately and others in succession, and where the first were paid in full, and the money for the payment of the others invested in bank, by the failure of which a deficiency arose as to the deferred legacies, it was held that the latter could not compel contribution from the former, who had been paid

* 6. In cases where a payment has been made to the legatee beyond what he is entitled to retain, through mistake, as if the fund had been taken out of the personalty, when it should have come out of the realty, the legatee will not, upon being compelled to refund, be charged with interest, unless he has actually made interest upon the fund which he received, or is still entitled to be paid his legacy with interest.⁸

7. There is another question somewhat analogous to those already discussed in this section, — how far the legatee may follow the assets after they have been disposed of by the executor. We shall hereafter briefly allude to this matter in a general way, in speaking of the power of the executor or administrator to dispose of the assets.⁹ It may be said, in addition to what we have before stated, that the purchaser of the assets is only liable to be charged with a trust for the payment of debts and legacies where he is guilty of what the law characterizes as fraudulent conduct on his part. This will not be inferred because he knew of the representative character of the seller, since it is part of his office to dispose of the assets for the payment of debts and legacies, and the law invests him with a power of sale for that purpose. Nor will the fact that all the debts have been paid presumptively affect the purchaser with a fraudulent intent, since he is not bound to inquire how far the purposes of the administration require further sales. He may well presume, from the fact that the executor offers the assets for sale, that the purposes of the trust require it.¹⁰

in full. This question is extensively discussed in *Gallego's Ex'rs v. The Attorney-General*, 3 Leigh, 450. It is here held, that all the legacies given by will or codicils, and whether directed to be paid early or not, stand upon equal footing as to refunding what had been paid under a misapprehension as to the estate proving adequate to meet all; and that the unpaid legatees may look to the executor for their ratable proportion, and are not bound to look to those legatees who are overpaid their proportion. A query is here raised, whether the executors, being solvent, are entitled to call upon the overpaid legatees to refund the excess. Per *Tucker, J.* It seems they are. In *Evans v. Fisher*, 40 Miss. 644, it was held, that, where the assets were originally sufficient to pay debts and legacies, full-paid legatees are not compellable to refund to meet any deficiencies in the payment of legacies caused by the misapplication of the assets, but that creditors may compel them to refund in similar circumstances. See *Spencer v. Ward*, L. R. 9 Eq. 507.

⁸ Lord *Eldon*, Chancellor, in *Gittins v. Steele*, 1 Swanst. 199.

⁹ Post, pt. 3, § 32.

¹⁰ *Humble v. Bill*, 2 Vern. 444; which case was, indeed, reversed in the

8. It seems also to be well settled, that the personal
 * 460 * representative may mortgage the assets, whenever it becomes necessary to raise money for the purposes of carrying into effect the legal settlement of the estate.¹¹ This is more commonly the case in regard to testate than intestate estates, since in the former the trusts are often very numerous and complicated, and continue through a succession of years; whereas, in the latter, the occasions for raising money, beyond what may be done by the absolute disposition of the assets in the ordinary mode, are generally few and unimportant.

9. In the case of testate estates, the executor has been allowed to create mortgages upon the assets for various purposes, upon different conditions. It is not considered that the mortgagee is bound in any case to see to the application of the mortgage-money, unless he is aware that the executor is disposing of the assets for his own purposes, and not for those of the estate. This principle is distinctly recognized in a considerable number of cases.¹²

10. There is a large number of cases in which it has been held that the legatees may defeat a sale or mortgage, and follow the assets into the hands of those to whom the executor has disposed of them.¹³ It is said by Lord *Alvanley*, in *Andrew v. Wrigley*,¹⁴ "Can there be a stronger case of devastavit than an executor aliening the property of his testator to pay his own debts?" But in order to render the sale or mortgage void, even where accepted upon the executor's own debt, it must appear that it was done with the knowledge of the purchaser or mortgagee that the property formed part of the assets of the testator.¹⁵

House of Lords, but upon special grounds, not affecting its general authority for the purpose for which we have cited it. Sir *J. Jebyll*, in *Ewer v. Corbet*, 2 P. Wms. 148, and Lord *Alvanley*, in *Andrew v. Wrigley*, 4 Br. C. C. 125; *Burting v. Stonard*, 2 P. Wms. 150; *Langley v. Lord Oxford*, Amb. 17.

¹¹ Redf. Sett. Estates, § 32, pl. 4 and n. 10.

¹² *Scott v. Tyler*, 2 Dick. 712; *Elliot v. Merryman*, 3 Barnard. 78, 81; *Bonney v. Ridgard*, 1 Cox, 145; s. c. cited 4 Br. C. C. 132; *Mead v. Orrery*, 3 Atk. 235, 239.

¹³ *Hill v. Simpson*, 7 Vesey, 152; *M'Leod v. Drummond*, 17 Vesey, 152.

¹⁴ 4 Br. C. C. 125.

¹⁵ *Crane v. Drake*, 2 Vern. 616; *Pagett v. Hoskins*, Prec. in Ch. 431. But in every case where the purchaser or mortgagee pays a full consideration in money, or is ignorant of the property belonging to the estate, it seems to be considered that he is entitled to the benefit of the contract, unless he was

11. It seems that parties entitled to property or estate specifically * or generally bequeathed may lie by so long * 461 after they have been misapplied by the executor, that a court of equity will deny relief, on the ground of lapse of time and acquiescence by silence, and omission to take legal measures.¹⁶

12. But where the executor, by accepting funds held by the debtor of the estate in trust for other persons, secured money which he distributed among the legatees and next of kin at the same time with other moneys belonging to the estate, it was held the cestuis que trustent might recover the same of the legatees and next of kin by a bill in equity brought for that purpose.¹⁷

13. Where, in consequence of the omission of the executor to make payment of the debts, he having assets for that purpose, a creditor recovers judgment, and levies upon land specifically devised, the devisee may recover upon the executor's bond given for the payment of debts, he being also residuary legatee.¹⁸

SECTION V.

THE EXECUTOR'S ASSENT TO LEGACIES.

1. The assent of the executor, either express or implied, requisite at law to perfect the title of the legatee.
2. But if the executor unreasonably withhold such assent, he may be compelled to yield it by decree of court of equity.
3. What will amount to a valid assent is generally matter of fact, but may become a mere question of law.
4. Where there is doubt as to the assent, the construction should be charitable towards the executor, if the debts remain unpaid.
- 5, and n. 15. The assent of the executor may be presumed from lapse of time and acquiescence.

§ 30. 1. It seems to be a settled rule, that the title of a legatee, whether specific or general, does not become perfected at law until cognizant of the executor's purpose of misapplying the money, and entered into the contract with a view to forward that purpose. In confirmation of this general view, Mr. *Roper* (vol. i. pp. 439-456) cites, in addition to those before referred to, *Spackman v. Timbrell*, 8 Sim. 253, 260; *Keane v. Robarts*, 4 Madd. 332, 359, and some others. See also *Nugent v. Gifford*, 1 Atk. 463; *Taner v. Ivie*, 2 Ves. Sen. 469; *Whale v. Booth*, 4 T. R. 625 and notes.

¹⁶ *Andrew v. Wrigley*, 4 Br. C. C. 125.

¹⁷ *Green v. Givan*, 33 N. Y. 343.

¹⁸ *Paine v. Gill*, 13 Mass. 365.

after the assent of the executor ;¹ although, in equity, the
 * 462 executor * is regarded as a mere trustee, with a right to
 withhold his assent to perfect the title at law until after the
 payment of debts.² Nor can the legatee claim fully to be the
 owner of the thing thus specifically bequeathed, or of a money
 legacy, until it appear there are assets sufficient for the payment
 of debts ; but the acquiescence of the executor is equivalent to ex-
 press assent.³ But the legatee, even before the assent of the

¹ *Northey v. Northey*, 2 Atk. 77; *Abney v. Miller*, id. 593. The assent of the executor seems to be of no practical effect, except in the case of a specific legacy, where it has been held the title of the legatee does not become so far perfected as to enable him to maintain trover or trespass or replevin, or any other appropriate action, to vindicate his title, until after the assent of the executor. But the rule seems to have been extended to all legacies, general as well as specific, and even to the forgiveness of a debt by way of legacy; since no legacy, even of the latter class, should become absolute and unconditional until after the executor consents to waive all claims upon the assets out of which the legacy is coming for the payment of debts. 1 Roper, 842, 843; by Lord *Hardwicke*, in *Sibthorp v. Moxton*, 1 Ves. Sen. 49, 50. It was the practice of the Bank of England, under its act of incorporation and other statutes, to transfer its stock which had been made the subject of a bequest, either specifically or by way of residuary bequest, directly to the legatee, upon examination of the probates of the wills. But this was held irregular, and that the bank could not look beyond the legal title, and therefore cannot prevent the executor from selling out or transferring stock into his own name. *Bank of England v. Parsons*, 5 Vesey, 665; *Same v. Moffat*, 3 Br. C. C. 260, 262, 263, and notes (Am ed.); *Same v. Lunn*, 15 Vesey, 569; *Franklin v. Bank of England*, 1 Russ. 575; s. c. 9 B. & Cr. 156; post, pt. 3, § 25, pl. 4. The general principle of the necessity of the assent of the executor to a specific legacy, in order to perfect the title of the legatee, is generally adhered to in the American courts. *Lark v. Linstead*, 2 Md. Ch. 162; *Burchard v. Wright*, 11 Leigh, 463; *Nelson's Adm'r v. Cornwell*, 11 Gratt. 724. The cases are very numerous in the American reports where this assent has been required; but they turn mostly upon the question, what will be regarded as satisfactory evidence of such assent. It is clear this may be implied as well as express. See post, n. 15.

² *Const v. Harris*, Turn. & R. 496, 514.

³ *Andrews v. Hunneman*, 6 Pick. 126. See also *Frazer v. Beville*, 11 Gratt. 9; *Wilson v. Rine*, 1 H. & J. 138. The specific legatee must hold possession of the thing four years, in South Carolina, to put it beyond the reach of creditors. *Alexander v. Williams*, 2 Hill, S. C. 522. An assent of the executor on condition the decision of the court is in favor of the legatee, as to the general right to the thing, will be sufficient. *Lillard v. Reynolds*, 3 Ired. 366. And the assent of the executor to the principal bequest will carry all its accessories. *Conner v. Satchwell*, 4 Dev. & Batt. 72. The assent of the execu-

executor, has such an inchoate title as will pass to his personal representative in case of his decease.⁴ * And it would * 463 seem that the assent of the executor is requisite to perfect a legacy, forgiving one his debt to the testator, since such a bequest would become wholly inoperative if the assets were insufficient to meet the debts.⁵ And it would seem, also, that the executor may maintain an action for the thing specifically bequeathed, even against the legatee, who has obtained possession of the same without his assent.⁶

2. It seems, however, agreed on all hands, that, if the executor unreasonably withhold his assent to a legacy, he may be compelled, in a court of equity, to yield it.⁷

3. What shall amount to a valid assent of the executor, so as to vest a complete title in the legatee, is often a question of considerable uncertainty and perplexity. Whether there has been a valid assent of the executor is so far matter of law, that it is proper for the court to determine, where there is no valid proof of such assent to be weighed by the jury;⁸ but it is generally matter of fact to be determined by the jury,⁹ under such general instructions, in regard to the nature and extent of the assent required, as the court can conveniently give.

4. It is scarcely necessary to go much into detail as to what precise acts or declarations of the executor will amount to an assent to a legacy, since it must be much the same as in regard to proof of assent in any other particular. It may be implied as well as express, and by way of inference as well as by express proof.¹⁰

tor may be at any time, and may be presumed from his conduct. *Thompson v. Schmidt*, 3 Hill, S. C. 156. But his assent must be after he receives letters testamentary. *Gardner v. Gantt*, 19 Ala. 666. The duty of the executor to deliver a specific legacy, after his assent to it, cannot be legally affected by a stay law. *Dunham v. Elford*, 13 Rich. Eq. 190.

⁴ 2 Wms. Ex'rs, 1236.

⁵ *Rider v. Wager*, 2 P. Wms. 328; 2 Wms. Ex'rs, 1236; *Sibthorp v. Moxom*, 3 Atk. 580.

⁶ 1 Roper, 845; *Mead v. Lord Orrery*, 3 Atk. 235, 239, where it is said the executor has not only a bare authority, but the interest in the thing bequeathed, until after his assent to the legacy.

⁷ 2 Wms. Ex'rs, 1238; Com. Dig. Adm. C. 3.

⁸ *Elliott v. Elliott*, 9 M. & W. 23, 27, by Lord Abinger, C. B.

⁹ *Mason v. Farnell*, 12 M. & W. 674.

¹⁰ 3 Wms. Ex'rs, 1238, 1239. See also *Trail v. Bull*, 1 Coll. C. C. 352.

Where the assent is express and direct, there can be no question.¹¹ But where the words or acts on the part of the executor are equivocal, he should be allowed the advantage of any reasonable doubt arising upon their construction,¹² and especially so long as the debts remain unprovided for.

5. The assent of the executor may be presumed, as where * 464 the * executors de cease after the debts are paid, but before the payment of the legacies.¹³ This may also be presumed, as before intimated, from the legatee taking possession of the thing specifically bequeathed, and the executor omitting to interfere.¹⁴ But, in a very late English case, it was held the lapse of six years was no evidence of the executor's assent to the legacy, but one out of three named in the will having assumed the trust.¹⁵

¹¹ *Hawkes v. Saunders*, Cowp. 289, 293.

¹² *Doe v. Harris*, 16 M. & W. 517.

¹³ *Cray v. Willis*, 2 P. Wms. 529. See *Murphree v. Singleton*, 37 Ala. 412.

¹⁴ Ante, n. 1. By the Mass. Gen. Stats. ch. 97, § 22, an action at law is given for the recovery of all legacies, and a similar provision had existed there from 1783. But by *Parker*, Ch. J., in *Andrews v. Hunneman*, 6 Pick. 126, 129, "This action will not lie immediately on the death of the testator, because it may not be known whether there are assets sufficient for the debts, unless there is an assent" of the executor.

¹⁵ *Hawkins v. Williams*, 10 Weekly Reporter, 692, in the Queen's Bench. But in the American courts the cases are very numerous where the assent of the executor has been presumed from lapse of time, and in many instances without any long period having elapsed. Each case will depend upon its own peculiar circumstances. See, upon this general question of acquiescence, *Lowry v. Mountjoy*, 6 Call, 55; *Frazer, Adm'r, v. Bevell*, 11 Gratt. 9; *Merritt v. Windley*, 3 Dev. 399; *White v. White*, 4 id. 257; s. c. and s. p. 1 Dev. & Batt. 260; *White v. White*, 4 id. 401; *Cheshire v. Cheshire*, 2 id. 254; *Rea v. Rhodes*, 5 Ired. Eq. 148; *Pirtle's Adm'r v. Cowan's Adm'r*, 4 Dana, 302; *Toulman v. Heaveren*, 2 B. Mon. 126; *Squires v. Old*, 7 Humph. 454; *Finch v. Rogers*, 11 id. 559; *George v. Goldsby*, 23 Ala. 326. After the executor's assent, the title of the legatee to the specific thing bequeathed is perfect at law. *Nancy v. Snell*, 6 Dana, 148, 152. And it will make no difference that the assets are insufficient to pay debts. *Ib.* It seems to have been held in one case in Kentucky, *King v. Mims*, 7 Dana, 267, that the title of the legatee to a chattel specifically bequeathed may become perfect, without the assent of the executor; but the rule of law is clearly otherwise. *Nunn v. Owens*, 3 Strobb. 101. Where the administrator, with the will annexed, holds possession of the specific bequest in trust for the legatee, his assent will be presumed. *Buffaloe v. Baugh*, 12 Ired. 201; *Doe v. Mabblerley*, 6 C. & P. 126. But the executor being witness to a deed by the legatee is no implied assent. *Burkhead v. Colson*, 2 Dev. & Batt. Eq. 77. Where the executor is himself the legatee,

* SECTION VI.

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AT WHAT TIME LEGACIES ARE TO BE PAID. — RULES AS TO PAYMENT OF INTEREST.

- 1, and n. 1. Legacies payable one year after decease of testator, unless further deferred.
2. But in the latter case, payable at the time directed.
3. Interest payable after legacy due. Exceptions.
4. In case of specific legacies, accumulations follow the corpus.
5. Legacies as between parent and children on interest from the death of testator. Qualifications.
6. This rule does not, in general, extend to other relations. Exceptions.
- 7, and n. 21. Under what circumstances legacy deferred as to payment will entitle first taker to interest in the mean time.
8. Where the money is paid into court, legatee entitled to no interest, unless earned by new investment.
9. The American cases adopt the same rule, both as to time of payment and interest.
10. The rule as stated by Chancellor *Walworth*.
11. The bequest of the residue carries such income as the fund actually raises.
12. The cases in *Massachusetts* adopt the same rule.
13. The rule as stated by Chancellor *Kent*.
- 14, and n. 36. The case of annuities and interest upon legacy for life discussed.
- 15, and n. 37. Where legacy payable at remote day, courts of equity will decree the appropriation and investment of the money.

the assent is still necessary, but will be implied. *Chester v. Greer*, 5 *Humph.* 26. Or the executor may allege his assent in his bill. *Quinton v. Frith*, L. R. (Ir.) 2 *Eq.* 396. And it may be expressly stated in any proceedings to enforce the same. *Quinton v. Frith*, *supra*. But if the executor unreasonably refuse to give his assent to a specific legacy, he may be compelled to do so in a court of equity. *Ib.*; *Crist v. Crist*, 1 *Ind.* 570. The statute in *Mississippi* dispenses with the assent of the executor by providing the legatee may sue at law. *Worten v. Howard*, 2 *Sm. & M.* 527; *Magee v. Gregg*, 11 *id.* 70. Where the same thing is specifically bequeathed to one for life, and then over to another, the assent of the executor to the first bequest will enure to perfect the title of him entitled in remainder. *Lewis v. Smith*, 4 *Dev. & Batt.* 326. But see *Attorney-General v. Potter*, 5 *Beav.* 164; *Lynch v. Thomas*, 3 *Leigh*, 682; *McClanahan v. Davis*, 8 *How. U. S.* 170; *Adams v. Peirce*, 3 *P. Wms.* 11; *Jordan v. Thornton*, 7 *Ga.* 517. Where the testator in his will forgives a debt, the assent of the executor is requisite before the debt is relinquished. *Cheshire v. Cheshire*, 2 *Dev. & Batt.* 254; *Hearne v. Kevan*, 2 *Ired. Eq.* 34.

16. Summary of opinion by *Bradwell, J.*

17. Direction to invest a sum of money, and pay the income, will entitle the beneficiary to interest from testator's decease.

§ 31. 1. ONE year is allowed the executor to ascertain the nature and extent of the assets, as well as the claims to be discharged by them; and until the expiration of that period, he cannot be compelled to pay the general legacies. This was the rule of the civil law, and is very generally adopted by the English courts; and equally by the American courts, unless controlled by particular statutes.¹ And it will not enable the legatee to compel payment, even where the testator so directs, within the year.²

2. But if the payment of a legacy is postponed by an interven-

¹ *Wood v. Penoyre*, 13 Vesey, 326, 333, 334; *Pearson v. Pearson*, 1 Sch. & Lef. 10. It will make no difference that a legacy is made dependent upon a condition subsequent, as if it were to be void upon the legatee succeeding to another estate, or to be paid on condition he did not interfere with the education of his daughter. He is still entitled to be paid at the same time as other legatees, and is not, in general, bound to give security to refund in case of failure of the condition upon which the title rests. *Fawkes v. Gray*, 18 Vesey, 131; *Griffiths v. Smith*, 1 Ves. Jr. 97. But in the case of a legacy to the father, upon condition he did not interfere with the education of his daughter, he was required to give security to perform the condition, to be approved by the master, and the costs to be deducted from the legacy. *Colston v. Morris*, Madd. & Geld. 89. See ante, § 7. The same doctrine prevails in the American courts. *Hepburn v. Hepburn*, 2 Bradf. Sur. Rep. 74; *Eyre v. Golding*, 5 Binney, 472, 475; *Bitzer v. Hahn*, 14 S. & R. 232, 238; *Hammond v. Hammond*, 2 Bland, Ch. 306; *Crain v. Barnes*, 1 Md. Ch. 151; *White v. Donnell*, 3 id. 526. And it is held in the last case that any direction in the will to pay immediately, or as soon as convenient, will not take the case out of the general rule. See also *Loring v. Woodward*, 41 N. H. 391. See also *Campbell v. Cowdrey*, 31 How. Pr. 172; *Mills v. Mills*, 3 Head, 705; *Sparks v. Weedon*, 21 Md. 165. The whole subject of interest upon legacies of every kind is extensively discussed in *Custis v. Potter*, 1 Houst. 382, and the rules laid down in this chapter maintained; s. p. *Darden v. Orgain*, 5 Coldw. 211. It will make no difference as to the time a legacy falls due that it is payable out of the avails of real estate. *Turner v. Buck*, 22 W. R. 748.

² *Benson v. Maude*, Madd. & Geld. 15; *Brooke v. Lewis*, id. 358. But this delay of payment will not affect the vesting of the right of the legatee. *Garthshore v. Chalie*, 10 Vesey, 1, 13. Nor does the rule render it lawful to pay the legacies at any time within the first year, if the executor is so disposed, or expose him to any special hazard thereby. Lord *Eldon*, Chancellor, in *Angerstein v. Martin*, Turn. & Russ. 232, 241.

ing estate, or for any other cause, more than a year after the testator's death, it becomes payable immediately upon the right accruing; and the executor is not in such cases entitled to any delay.³ And where a legacy to infants is directed to be kept in the hands of a trustee, and paid over to those entitled when they respectively arrive at the age of twenty, but appointing no trustee, it was held the executor was bound to act as trustee. (a)

3. And, in general, interest is recoverable only from the time a legacy is payable.⁴ And it will make no difference that the * executor is directed in the will to pay the legacy "as soon * 467 as possible."⁵ But where the legacy operates in satisfaction of a debt due, or bearing interest, it will bear interest from the death of the testator.⁶ And where the testator charges his land with the payment of the debts of a third person, he will be regarded as having made them his own, and interest will be recoverable from his decease.⁷ And in *Pearson v. Pearson*⁸ Lord *Redesdale* said: "In the case of legacies charged upon lands only, where no day of payment is fixed, interest must be chargeable from the death of the testator." And it will not entitle the legatee of a pecuniary legacy to interest at any earlier day because the fund out of which the payment is directed to be made is one bearing interest.⁹ Nor will it excuse the executor from paying interest, that the funds from which payment is to be made have not become disposable within the year.⁹

4. It is scarcely necessary to mention, after what has been

* *Laundy v. Williams*, 2 P. Wms. 478; *Miller v. Philip*, 5 Paige, 573. And interest is payable from the time the legacy is made payable. *Hearle v. Greenbank*, 3 Atk. 696, 716; *Wordsworth v. Younger*, 3 Ves. 73; *Ballantyne v. Turner*, 6 Jones, Eq. 224. But where the legacies were directed to be paid when pending litigation should terminate, it was held no interest would accrue till after that event occurred, although more than eighteen years from the decease of the testatrix. *Lord v. Lord*, Law Rep. 2 Ch. App. 782.

(a) *Holbrook v. Harrington*, 16 Gray, 102. But no doubt the probate court or a court of equity, upon the application of the executor, would have appointed a trustee, and ordered the money paid to him.

⁴ *Wood v. Penoyre*. 13 Vesey, 326, 333, 344. And that is commonly one year from the decease of the testator. *Crain v. Barnes*, 1 Md. Dec. 151.

⁵ *Webster v. Hale*, 8 Vesey, 410, 413.

⁶ *Clark v. Sewell*, 3 Atk. 96, 99.

⁷ *Shirt v. Westby*, 16 Vesey, 393.

⁸ 1 Sch. & Lef. 10, 11; *Spurway v. Glynn*, 9 Vesey, 483.

⁹ *Pearson v. Pearson*, 1 Sch. & Lef. 10.

said,¹⁰ that specific legacies will carry any accessions by way of increase or interest, which shall accrue after the decease of the testator,¹¹ and in many instances all that accrues after the date of the will.¹²

5. Where a legacy is given by a parent to his child, or by one in loco parentis by way of maintenance, and the possession of the principal deferred, it is held that the legatee is entitled to interest from the death of the testator.¹³ But this rule will not ap-

¹⁰ Ante, § 7.

¹¹ *Sleech v. Thorington*, 2 Ves. Sen. 560.

¹² Ante, § 7, pl. 20.

¹³ *Acherley v. Wheeler*, 1 P. Wms. 783; *Hill v. Hill*, 3 V. & B. 183; *Rogers v. Soutten*, 2 Keen, 598. The same rule obtains in the American courts. *Kennedy, J.*, in *Magoffin v. Patton*, 4 Rawle, 113-119; *Huston's Appeal*, 9 Watts, 472; *Bird's Estate*, 2 Parsons, 168; *Dawes v. Swan*, 4 Mass. 208; *Bradner v. Faulkner*, 12 N. Y. 472; *Burtis v. Dodge*, 1 Barb. Ch. 77. The rule is the same as to children as it is to a widow in lieu of dower. *Hepburn v. Hepburn*, 2 Bradf. Sur. Rep. 74; *Parkinson v. Parkinson*, id. 77; *Seymour v. Butler*, 3 id. 193; *Williamson v. Williamson*, 6 Paige, 298; *Pollard v. Pollard*, 1 Allen, 490. But the rule does not extend to the case of a grandchild. *Van Bramer v. Hoffman*, 2 Johns. Cas. 200; *Walker v. Walker*, 17 Ala. 396. Interest is recoverable upon a legacy from the time it is payable, although not demanded. *Birdsall v. Hewlett*, 1 Paige, 32; *Glen v. Fisher*, 6 Johns. Ch. 33. And as said in another case, although there is no hand to receive it. *Lyon's Adm'r v. Magagnos' Adm'r*, 7 Gratt. 377. But the rule is otherwise where the executor is made responsible for the devastavit of his coexecutor. *Sparhawk v. Buell's Ex'r*, 9 Vt. 41. See also *Marsh v. Hague*, 1 Edw. 174. Interest is generally recoverable upon a legacy from the time it becomes vested and payable. *Smith's Ex'rs v. Field*, 6 Dana, 361. But if the bequest is absolute, and only the time of enjoyment postponed, interest is recoverable after the executor has the money in hand. *Jones v. Ward*, 10 Yerg. 160. Interest is not allowable upon arrears of annuity, unless under special circumstances. *Lawrence v. Embree*, 3 Bradf. Sur. Rep. 364. Executors retaining money belonging to infants without excuse, liable for interest and costs. *Stephens v. Van Buren*, 1 Paige, 479. Where one who puts himself in loco parentis to another, and as such makes a legacy to him, interest accrues from his decease. *Wilson v. Maddison*, 2 Yo. & Coll. C. C. 372. But interest upon the arrears of an annuity as well as upon legacies due is liable to be affected by the unproductiveness of the estate, and the fact that the executor is not under orders from any competent court to make an investment of the funds. The proper course is, where the funds of the estate are not already so invested as to be productive, and for any reason delay occurs in payment of annuities or legacies, to procure an order for placing the money at interest. *Taylor v. Taylor*, 8 Hare, 120. This question of charging the executor with interest upon an estate during the suspension of its settlement, by reason of preceding litiga-

ply * where the maintenance of the child is otherwise pro- * 468
vided for, either by the will or in any other mode.¹⁴ And
where a particular * sum is specified in the will of the par- * 469
ent for the maintenance of the child, no greater sum will in
general be appropriated for that purpose, although it be less than
the interest of the legacy.¹⁵ But an increase beyond that will be
allowed under special circumstances.¹⁶

6. This rule as to interest is not, in general, extended to other
relations than that of parent and child, or those having assumed
that relation; as, for instance, in favor of nephews, nieces, and
grandchildren of the testator.¹⁷ But in some special cases, where,
tion, is largely discussed in a recent case, *Colt v. Colt*, 33 Conn. 270. See also
Lainson v. Lainson, 23 Eng. L. & Eq. 15. Where legacies to children are not
made payable till twenty-one, and are given over on failure to arrive at that
age, and trustees and guardians of the children are appointed to attend to the
education of the children, they will be entitled to interest on the legacies until
twenty-one or death. *Mills v. Robarts*, 1 Russ. & M. 555; *Rogers v. Sout-
ten*, 2 Keen, 598. In some such cases, maintenance only is allowed. *Rudge
v. Winnall*, 12 Beav. 357. And that is sometimes ordered to be paid from
the estate in lieu of interest. *Donovan v. Needham*, 9 Beav. 164. See also
McWilliams v. Falcon, 6 Jones, Eq. 235; *Mordecai v. Boylan*, id. 365. In-
terest allowed by way of maintenance. *Martin v. Martin*, Law Rep. 1 Eq.
369. But see *Ex parte Kebble*, 11 Vesey, 604. Where a contingent legacy
is left to an infant, and the executors are empowered to apply the income for
the maintenance, education, and benefit of the infant, it will carry interest
from the death of the testator, although he may not have stood in loco parentis.
In re Richards, L. R. 8 Eq. 119. But where the amount of a legacy is di-
rected to be invested in a security bearing a higher rate of interest than the
ordinary legal rate, and the interest is directed to be paid to an infant, the
increased rate of interest will not be payable until some specific investment of
this particular legacy, although the bulk of the estate may have been invested
at the higher rate of interest for a long period before this legacy is claimed.
Re Bowyer's Estate, per Vice-Chancellor *Giffard*, 19 Law T. N. S. 482. It
would seem there might be some ground to question the foregoing rule as
applicable to most cases; for it is no hardship to the estate to be required to
pay the same rate of interest received upon the fund out of which the pro-
vision for the legacy is directed to be made. And as to the executor, it was
clearly his default that the specific investment was not made according to the
directions of the will; and if so, he should surely be required to pay the higher
rate of interest to the infant, although he may not be allowed to charge it to
the estate.

¹⁴ In the *Matter of Rouse's Estate*, 9 Hare, 649.

¹⁵ *Hearle v. Greenbank*, 3 Atk. 716; *Long v. Long*, 3 Vesey, 286, and n.

¹⁶ *Aynsworth v. Pratchett*, 13 Vesey, 321.

¹⁷ *Crickett v. Dolby*, 3 Vesey, 10.

from the language and circumstances of the bequest, it appeared obvious such was the intention of the testator, the legacy has been allowed to carry interest by way of maintenance of the legatee, although not standing in the relation of a child to the testator.¹⁸

7. Where the payment of a legacy is postponed by the testator, as until the legatee arrive at the age of twenty-one years, and is then directed to be paid with interest, the interest will only be reckoned from one year after the decease of the testator.¹⁹

* 470 But * where in such case, the legacy being vested, the first legatee dies before arriving at the age of enjoyment, by which the legatee over takes the bequest, it has been held that the interest accruing during the life of the infant will go to his personal representative, and not to the legatee over.²⁰ And the same rule applies to a residue bequeathed so as to vest immediately, but not to come into enjoyment until the age of twenty-one, with a gift over if the legatee die under that age, and this occurs: the interest during the life of the infant will go to his personal representative.²¹

¹⁸ *Leslie v. Leslie*, Cas. Ll. & G. temp. Sugd. 1; *Boddy v. Dawes*, 1 Keen, 362. Where money is left in trust, with direction that the interest and income be applied to the use of a person, such person is entitled to interest from the death of the testator, although the amount of the legacy is not fully ascertained at that time. *Cooke v. Mekeer*, 36 N. Y. 15. So also when an annuity is given for support. *Ib.*

¹⁹ *Knight v. Knight*, 2 Sim. & Stu. 490. And where charity legacies were given for the erection of a church, parsonage, and schools, and directed to be paid as they might be required for that purpose, without interest in the mean time, and there occurred a long delay, by reason of litigation, to test the validity of the bequests, it was held that the charities were entitled to interest after one year from the death of the testator. *Fisher v. Brierley*, 30 Beav. 267. In the same will there was a bequest of £5,000 for the endowment of the minister, so soon as the church should be built, but without any interest in the mean time. The court declined to decide the question of interest in the absence of the minister, but intimated that the interest before the appointment of the minister could not form part of the capital. *s. c.* 32 Beav. 602.

²⁰ *Montgomerie v. Woodley*, 5 Vesey, 522; *Taylor v. Johnson*, 2 P. Wms. 504; *Branstrom v. Wilkinson*, 7 Vesey, 421; *Barber v. Barber*, 3 My. & Cr. 688.

²¹ *Nicholls v. Osborn*, 2 P. Wms. 419; *Chaworth v. Hooper*, 1 Br. C. C. 82; *Hawkins v. Combe*, *id.* 335. The rule is different as to contingent bequests. In such cases the gift over carries the accumulations with the corpus

* 8. Where the money for the payment of a legacy is * 471 brought into court, and this is made known to the legatee, he will be entitled to no interest, unless such as is earned by the money when invested under the order of the court.²²

9. As far as we have been able to examine the American cases, they profess to go upon the principles already stated in this section, both as to the time a legacy becomes payable, and the right of the legatee to demand interest. That legacies are payable in one year from the decease of the testator, even where directed to be paid as soon as convenient, and also where the estate is so situated that it becomes impracticable to convert the assets into money in that time, seems to be the rule adopted in those states where the question has arisen.²³

of the fund. 2 Wms. Ex'rs, 1290. And so it is said, if there is nothing to evince an intention to have the interest paid to the infant before full age, and he never arrives at that age, his personal representative cannot claim what accrues during his life. 2 Wms. Ex'rs, 1290. But where the terms of the bequest provide that the first taker shall receive interest in the mean time, that is, until the contingency occurs, it will go to the personal representative in case of the decease of the first taker before the event, until that occurs. *Harris v. Finch*, M'Clel. 141. This general question is extensively discussed by the learned Surrogate in *Pinney v. Fancher*, 3 Bradf. Sur. Rep. 198, and the rule thus stated: A direct gift to a minor is vested, notwithstanding it is given over in case of his death under age, or "without heirs." Though liable to be divested, on a contingency, the substituted legatees will only take the corpus from the time of the happening of the event on which it is limited over. The accruing interest in the mean time belongs to the minor, and may be appropriated for his support. This is the settled rule of the courts, where there is no provision for maintenance. The learned Surrogate adds, "But, even if the gift had not been vested, this application of the income might have been directed; for it is well settled by the cases, that the interest on legacies given by a parent to a child under age, and where there is no provision for maintenance, will be applied by the court to the support of the infant, although the legacies are conditional and not vested." Citing *Crickett v. Dolby*, 3 Vesey, 10; *Greenhill v. Waldoe*, Prec. Ch. 367; *Harvey v. Harvey*, 2 P. Wms. 21; *Incedon v. Northcote*, 3 Atk. 430, 438; *Brown v. Temperley*, 3 Russ. 263. But the two latter cases are bequests of the residue of personalty; and the court say, indeed, that maintenance shall be allowed out of the income, notwithstanding the bequest was contingent. In *Harvey v. Harvey*, the Master of the Rolls said, "That of late it had been the practice to allow maintenance even in case of legacies that were not vested." In the case of *Crickett v. Dolby*, Lord *Alvanley*, M. R., discusses the subject at great length; but the case is clearly one of a vested legacy. ²² *Maxwell v. Wettenhall*, 2 P. Wms. 26.

²³ *Martin v. Martin*, 6 Watts, 67; *Hoagland v. Schenck's Estate*, 1 Harri-

10. The subject, as affecting both interest and the time of payment of legacies, is considerably discussed by a learned and able judge, in *Williamson v. Williamson*,²⁴ and the following propositions declared:—

Where the interest or income of a residuary estate is bequeathed to a legatee for life, and no time is named for the commencement of such enjoyment, the legatee is entitled to the income of the clear residue as afterwards ascertained, to be computed from the death of the testator.

A legacy to a child, whose support is otherwise provided for by the bounty of the testator, is not to draw interest until one year from the decease of the testator, where no time of payment is named in the will; but a legacy to the widow, in lieu of dower, draws interest from the death of the testator, where no other means for her support during the first year from the testator's death is provided for in the will.²⁵

* 472 * 11. The general principle here assumed, that, upon the devise of a residuary estate, the legatee, although not entitled to demand payment until one year from the death of the testator, may then have interest upon the same from the death, seems to be well established both in the English and American courts.²⁶ But it seems to rest rather upon the presumptive intention of the testator than upon any other ground. And it is said, the general rule will not be departed from, unless it appears that

son, 370, 375; *Kent v. Dunham*, 106 Mass. 586; *Redf. Executors*, § 40, pl. 8.

²⁴ 6 Paige, 298.

²⁵ The mode of ascertaining the actual residue at the testator's death, as here given, is to deduct the general and specific legacies, adding five per cent of the amount of the general legacies to the residuum as the probable amount. It is here said to be the duty of the executors to invest the residue at five per cent interest, at the least, where it is given for life to one legatee, and the remainder over to others; and, unless this is done, the executors will be responsible to the remainder-men for the corpus of such fund, and interest from the decease of the tenant for life. The opinion of the Chancellor, in this case, is a valuable commentary both upon the cases and the principles involved.

²⁶ *Angerstein v. Martin*, Turn. & Russ. 232; *Hewitt v. Morris*, id. 241; *La Terriere v. Bulmer*, 2 Sim. 18; *Dimes v. Scott*, 4 Russ. 195; *Douglas v. Congreve*, 1 Keen, 410; *Taylor v. Clark*, 1 Hare, 161; *Caldecott v. Caldecott*, 1 Yo. & Coll. C. C. 737.

the testator's intention is incompatible with its application.²⁷ It is said by Sir *John Leach*, Vice-Chancellor, in *Stott v. Hollingworth*,²⁷ "It is a legal presumption, that, until the end of the year, the residue cannot be ascertained; and it seems the plainer rule to hold, that what is ascertained at the end of the year to be residue shall be the capital, to the interest of which the tenant for life of the residue shall be entitled." And this seems to us not unreasonable. But the general view, already stated, is [based upon the idea of keeping income and principal distinct; and this is very important where the bequest of the residue is to one for life, and then over. For in such cases the corpus of the fund vests, both in the tenant for life, and those entitled in remainder, ordinarily, at the decease of the testator; and the true rule seems to be, that for the first year the tenant for life shall be entitled to all the interest earned by the fund, as invested at the decease of the testator, until it can be permanently invested, which will commonly be at the end of the year; and after that to such income as results from the investment under the bequest. And where the residue is given absolutely, in the first instance, it will be payable at the end of the year, with such accumulations as have accrued.²⁸

* 12. The subject is considerably examined by *Shaw*, * 473 Ch. J., in *Lovering v. Minot*,²⁹ and the conclusion reached, that where a residue is bequeathed to trustees, to distribute the income to the testator's children for life, with remainder over, the tenants for life are entitled to the income from the decease of the testator. And the same rule is adopted in *Lamb v. Lamb*, where the bequest was made to the testator's widow.³⁰

13. In *Lupton v. Lupton*,³¹ the question of interest upon legacies is considerably examined by Chancellor *Kent*, who says: "The general rule is, that a legacy payable at a future day does not carry interest until after it is payable, unless it be a legacy to a child, . . . and the child has no other provision, nor any main-

²⁷ *Taylor v. Hibbert*, 1 Jac. & W. 308; *Griffith v. Morrison*, id. in note, 311; *Stott v. Hollingworth*, 3 Madd. 161; *Amphlett v. Parke*, 1 Sim. 275.

²⁸ *Dimes v. Scott*, 4 Russ. 195; *Taylor v. Clark*, 1 Hare, 161; ante, n. 26.

²⁹ 9 Cush. 151, 156.

³⁰ 11 Pick. 371; *Roof v. Fountain*, 20 Barb. 527. See also *Graham v. Graham*, Busbee, Eq. 291; *In re McCracken's Estate*, 29 Penn. St. 426; *Ackless v. Seekright*, Breese, 46; *Boardman v. Boardman*, 4 Allen, 179.

³¹ 2 Johns. Ch. 614, 628. And the same rule prevails in *Pennsylvania Miles v. Wister*, 5 Binn. 477, 479.

tenance in the mean time, allotted by the will. If there be no such provision, the legacy carries interest immediately.”³² “But the better opinion, or rather the weight of authority, is, that even this . . . does not apply to the case of grandchildren,” unless there is something special in the will indicating such a purpose in the testator.

14. The distinction between annuities and legacies of the interest or income of a sum of money, as to the time when it becomes payable, will be hereafter adverted to.³³ This is thus defined by Lord *Eldon*, in *Gibson v. Bott*:³⁴ “If an annuity is given, the first payment is paid at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years. It is only interest of the legacy; and till the legacy is payable, there is no fund to produce interest.” And in the case of *Wiggin v. Swett*³⁵ the same rule

* 474 * was applied to an annuity payable quarterly, making the first payment due in three months after the decease of the testator.³⁶

15. Where a legacy is made payable at some remote day, courts of equity will decree the appropriation and investment of the money.³⁷

³² Lord *Redesdale*, in *Ellis v. Ellis*, 1 Sch. & Lef. 1; Lord *Hardwicke*, in *Hearle v. Greenbank*, 3 Atk. 716.

³³ Post, pt. 3, § 25, pl. 13.

³⁴ 7 Vesey, 89, 96. The same rule is adopted in the American courts. *Eyre v. Golding*, 5 Binn. 472; *Bitzer v. Hahn*, 14 Serg. & R. 232.

³⁵ 6 Met. 194. The general rule of law is here adopted, that annuities are not apportionable.

³⁶ *Houghton v. Franklin*, 1 Sim. & Stu. 390; *Storer v. Prestage*, 3 Madd. 167; s. p. *Wiggin v. Swett*, 6 Met. 194. The general principle, that annuities are payable at the end of the first year, is recognized in a very large number of cases. *Fearn v. Young*, 9 Vesey, 549; *Stamper v. Pickering*, 9 Sim. 176. But where the first payment on an annuity, payable quarterly, was directed to be made in eighteen months after the testator's death, it was held that the annuity did not commence till fifteen months after the testator's death. *Irvin v. Ironmonger*, 2 Russ. & My. 531.

³⁷ *Ferrand v. Prentice*, Amb. 273; *Walker v. Cooke*, cited by Lord *Thurlow*, in *Green v. Pigot*, 1 Br. C. C. 105. And the same rule is adopted even where the legacy is contingent. *Green v. Pigot*, supra; *Carey v. Askew*, 2 Br. C. C. 58. See also *Governesses' Society v. Rusbridger*, 18 Beav. 467. But in some later cases it has been held the whole residue may be paid over to the residuary legatee upon his giving security for any legacies which are contingent. *Webber v. Webber*, 1 Sim. & Stu. 311. And it is now considered that an

16. The general subject of this chapter is discussed in a carefully prepared opinion³⁸ by *Bradwell, J.*, and the following

absolute appropriation for the payment of a legacy is binding upon all parties, and that the legatee will be entitled to all the income and any advance of the stocks or other fund appropriated, and is subject to any depreciation. *Burgess v. Robinson*, 3 Mer. 7, 10. But the contrary is intimated in *Sitwell v. Bernard*, 6 Vesey, 520.

³⁸ *Eichhold v. Greenebaum*, 1 Chicago Legal News, 210. A widow's legacy is not entitled to draw interest until one year from the decease of testator, there being no estate of which she was dowable. *Gill's Appeal*, 2 Penn. St. 221. A residuary legatee is entitled to all the interest made on the estate. *Spangler's Estate*, 9 Watts & S. 135. A widow's jointure is sometimes ordered to be paid before the settlement of the estate is ready to be closed. *Digby v. Boycott*, 4 Hare, 444. Interest allowed upon a Jamaica estate, after the end of one year, but not according to the Jamaica rate. *Bourke v. Ricketts*, 10 Vesey, 330. And an executor in India was only held to account in England for the funds in his hands at the English rate of interest, although the rate in India, where the money had been invested, was higher. *Holland v. Hughes*, 3 Mer. 685. Bequest of £20,000 to testator's natural daughter, to apply as much interest for her maintenance as the executors thought proper, held, that the legatee was entitled to interest from the decease of the testator. *Newman v. Bateson*, 3 Swanst. 689. But a legacy to the wife of the interest on £10,000, payable half-yearly, does not begin at the decease of testator, it being to be raised from capital in trade. *Stent v. Robinson*, 12 Vesey, 461. But where the interest on the fund is to be applied for maintenance of the beneficiary, it begins from the decease of testator. *Pickwick v. Gibbes*, 1 Beav. 271. Interest is sometimes allowed on arrears of an annuity. *Batten v. Earnley*, 2 P. Wms. 163; *Newman v. Auling*, 3 Atk. 579. But when the arrear is long, as for twelve years, interest has been denied, even when the annuity was in lieu of dower and thirds. *Tew v. Winterton*, 3 Br. C. C. 489, 493; s. c. 1 Ves. Jr. 451. Interest is to be reckoned from the time payment is directed in all cases. *Thomas v. Attorney-General*, 2 Yo. & Coll. Exch. 525. Posthumous child only entitled to interest from its birth. *Rawlins v. Rawlins*, 2 Cox, 425. Interest sometimes limited to maintenance, as before suggested. *Wynch v. Wynch*, 1 Cox, 433; *Chester v. Painter*, 2 P. Wms. 336; *Roden v. Smith*, Ambler, 588; *Feltham v. Feltham*, 2 P. Wms. 271; *Kingsland v. Betts*, 1 Edw. Ch. 596. But a legacy to children is sometimes held payable at the decease of testator. *Hoyt v. Hilton*, 2 Edw. Ch. 202. Interest upon interest allowed where the executors were allowed to retain it by order of court at their own suggestion. *Bowles v. Drayton*, 1 Desaus. 489. Maintenance may be decreed to adult legatees out of the income of legacy vested, but not yet payable. *Norris v. Fisher*, 2 Ashmead, 411. Interest allowed the widow entitled to an annuity where the executors neglected to make the investment as directed. *Isenhardt v. Brown*, 2 Edw. Ch. 341. An executor or administrator cannot be required to make payments to legatees or next of kin during the time allowed for settlement of the estate. But where it is clearly safe to do so, the

* 475 *propositions declared: A specific legacy carries interest from the death of the testator where the fund carries interest, or may be made to do so; a general legacy only from the time it is payable, except when a father bequeaths to his infant child, and makes no other provision for his support, and no other exists; a husband to his wife in lieu of dower; or where a legacy is given for a pre-existing debt, in which cases they draw interest from the death of the testator.

17. Where a sum of money is bequeathed to the executor in trust to invest the same, and pay the income to one, he will be entitled to the interest from the death of the testator.³⁹ And at whatever time the legatee shall decease, his personal representatives will be entitled to receive the arrears of interest up to the time of the decease. But the courts have unflinchingly

* 476 adhered to the *rule of not apportioning payments upon annuities; so that if they are not payable till the end of the year, or semiannually or quarterly, the annuitant's representatives are not entitled to any portion which accrues, after the last day of payment, during his life.⁴⁰

court will sometimes direct part payment. *Thomas v. Montgomery*, 1 R. & My. 729; *Edgar v. Shields*, 1 Grant's Cas. 361. The Probate Court, by virtue of its chancery powers in the control of the persons and estates of minors, will sometimes anticipate funds in order to provide maintenance for those in dependent condition. *Blackburn v. Hawkins*, 1 Eng. 50. Accruing rent given to devisee. *Vigor v. Harwood*, 12 Sim. 172; *Vickers v. Scott*, 3 My. & K. 500. But where the residuary estate embraced funds in a partnership which by its terms continued after the decease of the testator, and the residue was given for life to one, and then over, it was held the tenant for life was only entitled to interest at the rate of four per cent upon the amount invested in the partnership. *Jackson v. Jackson*, 17 W. R. 547.

³⁹ *Hilyard's Estate*, 5 Watts & S. 30.

⁴⁰ *Wiggin v. Swett*, 6 Met. 194; post, pt. 3, § 25, n. 17.

SECTION VII.

TO WHOM PAYMENT OF LEGACIES TO BE MADE.—THE EXECUTOR'S RIGHT TO RETAIN.

- 1, and n. 1. Where legacies directed to be paid to one, for the use of others, payment may be made to trustee.
- 2, and n. 4. Legacies to infants should be paid only to the regularly appointed guardian.
- 8, and n. 5. May be paid to father, or natural guardian, where so directed in will.
4. By statute in England, the executor may now pay such legacies into bank.
5. Capital of infant's fortune not applicable to maintenance, but only for settlement.
6. But the income is generally applicable to the maintenance of the infant.
- 7, and n. 14. No such allowance made where parents are of sufficient ability; and especially for past maintenance.
8. Courts of equity will sometimes apply the principal to maintain infants.
9. The trustee will not be made liable for doing what the court would have ordered.
10. As between others than parent and child, the income of a legacy cannot be applied for support until it becomes vested.
11. As a general rule, legacies to married women should be paid to the husband.
12. But courts of equity will require the husband to secure the support of the wife.
13. Until the wife's support is secured, the executor may refuse to pay the legacy to the husband.
14. The wife's equity to a settlement is not confined to cases brought for obtaining possession of her estate. She may maintain a bill on her own behalf.
15. Where the wife is living apart from the husband in adultery, the court will make no order.
16. This settlement upon the wife is equally for the benefit of the children; but their right does not attach until after a decree, &c.
17. The executor may pay the legacy to the husband, unless a suit is pending.
18. Where the legacy is given to the sole use of the wife, it may be paid her.
- 18 a. Mode of estimating present value of annuities in determining abatements.
19. It is the duty of the executor to retain all debts due from legatees.
20. The executor's lien prior to that of any assignee or mortgagee of the legatee.
21. It is no objection to the executor's right to retain, that the debt is barred by the statute of limitations. But it must be a legal debt.
22. The executor may retain the full amount of a bond debt and interest, although exceeding the penalty.

* § 32. 1. WHERE bequests are made to one person for the benefit of others, or with directions to expend them for the use of others, either generally or in a particular mode, it will

be safe for the executor to make payment, in all cases, to the legatee or trustee to whom the bequest is in terms given, without regard to those beneficially interested.¹ The question, in all such cases, will be one to be determined by construction of the words of the will, as applied to the facts, upon the question of intent; whether the testator intended to charge the executor with the duty of seeing the application of the money for the benefit of all the beneficiaries; or intended to cast that duty upon another, into whose care he expected the executor to pay the money, trusting to the confidence reposed in him by the testator.²

2. It seems to be well settled, that, in the case of a legacy to an infant, the executor will not be justified in paying the same either to the legatee or to the father, as natural guardian.³ In strictness, it should be paid only to the regularly appointed guardian.⁴

¹ *Cooper v. Thornton*, 3 Br. C. C. 96, 99, 186. This is where a legacy was given to A., "to be divided between himself and his family;" and it was held well paid to A. In *Robinson v. Tickell*, 8 Vesey, 142, the bequest was to A., "for her and her children's use," and a decree directed the transfer to A. s. r. *Alsop's Appeal*, 9 Penn. St. 374. But where the bequest was to one in trust for a Roman-Catholic college, the trustee having deceased, it was directed to be paid to the president of the institution, who had the management of its pecuniary concerns, without settling any scheme, although the Attorney-General desired one. *Walsh v. Gladstone*, 1 Phill. C. C. 290.

² Lord *Thurlow*, in *Cooper v. Thornton*, 3 Br. C. C. 96, 186; *Lee v. Brown*, 4 Vesey, 362, 367.

³ *Dagley v. Tolferry*, 1 P. Wms. 285.

⁴ *Sparhawk v. Buell*, 9 Vt. 41; *Miles v. Boyden*, 3 Pick. 213. But it was held in this last case, that where the executor resisted the claim of the infant, when payment was demanded by the father, solely upon the ground that the child had no claim to the legacy, he had thereby waived the necessity of a demand, and an action would lie for the recovery of the legacy in the name of the father, as *prochein ami*. And this is upon the ground that the father, by being allowed to prosecute, as *prochein ami*, thereby becomes the quasi guardian of the infant by appointment, or, which is the same thing, under the sanction of the court. A court of chancery may always appoint a guardian to infants for the purpose of receiving payment of a legacy. *Lang v. Pettus*, 11 Ala. 37. In New York it is required that in all cases where infants have no duly appointed guardians, who have given the requisite security for faithful administration, legacies due to such infants must be paid into court, and the income applied for their maintenance under the direction of the court. The authority of a foreign guardian will not be recognized as sufficient for that purpose. *McLoskey v. Reid*, 4 Bradf. Sur. Rep. 334; *Morell v. Dickey*, 1 Johns. Ch. 153; post, pt. 3, § 53. But where the father had borrowed money to meet his son's outfit to India, a legacy to the son was directed to be

* 3. The cases are very numerous where legacies to in- * 478
fants have been paid into the hands of the father or natural
guardian. But this has uniformly been held no ground for exoner-
ating the executor,⁵ unless after the infant legatees came of age
there had been long acquiescence in such payment by making no
claim against the executor, and not always even in such cases. But,
as we have before stated, if the will direct the payment to be made
to the father for the use of the children, such payment is all that
can be required of the executor.⁶ But it is not admissible to prove
such direction by parol evidence as seems to have been done in
Dagley v. Tolferry,⁵ as that would be to produce an important
qualification of the bequest by extrinsic evidence.⁷

4. But now by statute in England the executor may pay all such
legacies into the Bank of England, to the credit of the Accountant-
General, and thus relieve himself from all responsibility.⁸

5. But the executor cannot justify the application of any portion
of the capital of a legacy due an infant by way of support. The
infant is only liable for actual necessities furnished by the ex-
ecutor, when not procured in any other manner.⁹ The
general * rule is, that a trustee of his own authority shall * 479
not be allowed to break in upon the capital of an infant's
fortune. This the courts of equity will not do for the purpose of

paid the father. *Clay v. Pennington*, 8 Sim. 359. The general rule requires
that the father receive an appointment as guardian, and give the required
security, in order to be entitled to receive legacies due his minor children.
Genet v. Tallmadge, 1 Johns. Ch. 3.

⁵ *Dagley v. Tolferry*, 1 P. Wms. 285. In this case the infant acquiesced in
the payment to the father for fourteen or fifteen years after he came of age,
and was informed by the father of the payment to him, connected with a re-
quest not to apply to the executor, being in trade with the father; and in the
mean time they became bankrupt; and the assignees brought a bill to compel
the executor to pay the legacy, which was decreed, but without interest, by the
Master of the Rolls; and the Lord Chancellor, *Cowper*, who affirmed the de-
cree, said, "for that, if the same were reversed, it might encourage payments
to parents and guardians, in wrong of infant children;" but it was thought
a hard case, and the deposit ordered to be divided. And in *Philips v. Paget*,
2 Atk. 80, 81, a similar case, where the payment was made to the infants in
person, the eldest being sixteen years of age, was compromised by the pay-
ment of half the amount of the legacy and no interest.

⁶ Ante, pl. 1 and note.

⁷ Lord *Alvanley*, M. R., in *Cooper v. Thornton*, 3 Br. C. C. 96.

⁸ 36 Geo. III. c. 52, § 32.

⁹ *Davies v. Austen*, 1 Ves. Jr. 247; s. c. 3 Br. C. C. 178.

maintenance, although sometimes done for the purpose of advancement and settlement of the infant in life or business.¹⁰

6. But it is said by text-writers and judges, that where the testator is the parent, or in loco parentis, of an infant legatee, whether the legacy be contingent or vested, interest on the legacy shall be allowed as a maintenance from the time of the death of the testator.¹¹ And, in all cases where a legacy is given to an infant by one not in loco parentis, the court will order maintenance out of the income of the legacy, although no express provision for maintenance is made (the father being unable to maintain the legatees), even where the income is expressly directed to accumulate.¹²

7. But it is held that no such allowance should be made where the parents are of sufficient ability to afford the infants suitable maintenance, according to their position and reasonable expectations in life.¹³ And the court will never make an allowance to the parent for the past maintenance of his infant children, with a view to reduce the amount for which the trustees of a fund due them shall be held responsible, unless under very special circumstances.¹⁴

¹⁰ *Walker v. Wetherell*, 6 Vesey, 473.

¹¹ *Ante*, § 31, pl. 5; 2 Wms. Ex'rs, 1272.

¹² *Greenwell v. Greenwell*, 5 Vesey, 194; *Collis v. Blackburn*, 9 Vesey, 470; *Stretch v. Watkins*, 1 Madd. 253.

¹³ *Ex parte Williams*, 2 Coll. C. C. 740; *Andrews v. Partington*, 3 Br. C. C. 60.

¹⁴ *Ex parte Bond*, 2 My. & K. 439. For a period, under the administration of Lord *Eldon* and Lord *Loughborough*, allowances were made much as matter of course for past maintenance. *Greenwell v. Greenwell*, 5 Vesey, 194, 199; *Reeves v. Brymer*, 6 id. 425; *Sherwood v. Smith*, id. 454. Lord *Thurlow* declined to make any such allowance. *Andrews v. Partington*, 3 Br. C. C. 60. But in *Maberly v. Turton*, 14 Ves. 499, Lord *Eldon* referred it to a Master to determine whether an allowance for past maintenance should be made for the benefit of trustees, where a portion of the income had been applied to the maintenance of the children, without the exercise of the discretion of the trustees, to whose judgment it was referred by the testator, the trustees having deceased, and the father of the children, being the executor of the surviving trustee, had applied the income of the fund towards the support of the children, without any authority for so doing. The question submitted to the Master in this case was, "whether it would have been reasonable and proper for any trustee or trustees, acting in the execution of this will, to apply any, and what part, of the interest and dividends . . . towards the maintenance of the children, and in what proportions as between such children respectively; . . . the Master to have regard to the situation, circumstances, and ability of

* 8. It is sometimes necessary for courts of equity, where * 480 the fund belonging to an infant is very small, to apply the principal towards support, where there are no other means available.¹⁵

9. It seems to be entirely well settled in the English courts of equity, that if an executor or any other trustee conducts the administration of the trust in such a manner as the court, if it had been applied to in advance, would have sanctioned, "he shall not be called to account, and forced to undo that merely because it was done without application."¹⁶

10. It has been held where a legacy is given to such of a class as shall attain twenty-one, or when the youngest shall attain twenty-one, as between grandfather and grandchildren, that the interest cannot be applied to the maintenance from the decease of the testator, or until the bequest becomes absolute.¹⁷ But we apprehend this rule will not apply to the case of a legacy from the parent to his child.¹⁸

* 11. As a general rule, legacies to married women * 481

the father, and the fortunes of his children." His lordship added: "I desire to be understood, that I do this upon the particular circumstances of this will." This seems to be the true state of the modern English law upon the question. We had occasion to discuss many of the questions embraced in this section, about the date of the first case cited in this note, in *Sparhawk v. Buell*, 9 Vt. 41, where the cases antecedent to that period are very generally cited by counsel. We can now perceive that the case might, without much violation of principle, have been decided even more favorably for the trustees than it was, although at the time we felt otherwise. The dissenting opinion of Mr. Justice *Phelps*, a very high authority, presents the claim of the trustees in the most persuasive attitude. The opinion extends over nearly thirty pages, and is well worthy the attention of the profession. Upon the general question of allowing for past maintenance of children, see *Stopford v. Lord Canterbury*, 11 Sim. 82; *Stephens v. Lawry*, 2 Y. & C. C. C. 87; *Sisson v. Shaw*, 9 Vesey, 285. But no allowance can be made beyond the actual expenditure, although more might have been expended with perfect propriety. *Bruin v. Knott*, 1 Phill. C. C. 572.

¹⁵ *Ex parte Green*, 1 Jac. & Walk. 253.

¹⁶ *Lee v. Brown*, 4 Vesey, 362, 369, by Sir *R. P. Arden*, M. R.; *Andrews v. Partington*, 3 Br. C. C. 60, 401. And in one case, where the trustee held funds for an infant until twenty-one, and, upon the false representation of the cestui que trust and her parents that she was of age, paid her the fund at nineteen years of age, he was held excused. *Overton v. Banister*, 3 Hare, 503.

¹⁷ *Lomax v. Lomax*, 11 Vesey, 48; *Errington v. Chapman*, 12 id. 20, 23.

¹⁸ *Ante*, pl. 6.

should be paid to the husband. And it will make no difference that the legatee is living apart from her husband.¹⁹ But the court will in some cases order the income paid to the wife instead of the husband, where poverty and other circumstances seem to require it.²⁰ The same general rule obtains, as far as we know, in all the American states.²¹

12. But courts of equity will require the husband, upon receiving a legacy belonging to the wife, to make a suitable provision for her support, if that is not already provided for.²² And although it was formerly said that courts of equity would not require the whole fund to be settled upon the wife, it seems now that no such limitation will be adhered to, but the court will act its discretion in the matter.²³

13. And until the reasonable support of the wife is in some way made secure, the executor will be justified in refusing to pay the amount of a legacy due her into the husband's hands. And it will make no difference that the sum is small.²⁴

* 482 * 14. This remedy in favor of the wife is not confined to

¹⁹ *Palmer v. Trevor*, 1 Vern. 261. See also *Ranking v. Barnard*, 5 Madd. 32; *Elliott v. Cordell*, id. 149. But the husband's indebtedness is not to be deducted from the wife's legacy. *Davis v. Elmes*, 1 Beav. 131. Legacy to wife of husband domiciled abroad ordered paid to him, he being entitled to receive it by the foreign law. *Campbell v. French*, 3 Vesey, 321, 323.

²⁰ *Steed v. Calley*, 2 My. & K. 52. See *Gilchrist v. Cator*, 1 DeG. & S. 188. The wife surviving the husband is entitled to a legacy given to her. *Harrison v. Andrews*, 13 Simons, 595. A woman may waive her equitable settlement. *Packer v. Packer*, 1 Coll. C. C. 92. But the courts of equity have sometimes declined to take the consent of a married woman to the payment out of court of money in her right without securing her a settlement out of it. *Stubbs v. Sargon*, 2 Beav. 496. But children of a deceased wife cannot claim a settlement upon them out of moneys of the mother coming to the hands of the husband. *Baker v. Bayldon*, 8 Hare, 210. And executors and trustees for married women should be assured that the same will go according to the unbiassed will of the legatee before making payment. A direction in a will made subsequent to a marriage settlement held independent of it. *Mainwaring's Settlement*, Law Rep. 2 Eq. 487.

²¹ *Farie's Appeal*, 23 Penn. St. 29; *Bason v. Holt*, 2 Jones, Law, 323; *Wade v. Russell*, 17 Ga. 425.

²² *Brown v. Elton*, 3 P. Wms. 202; *Lady Elibank v. Montolieu*, 5 Vesey, 737.

²³ *Scott v. Spashett*, 3 Mac. & G. 599; *Dunkley v. Dunkley*, 2 DeG., M. & G. 390; *Marshall v. Fowler*, 16 Beav. 249; *Walker v. Drury*, 17 id. 482; *Francis v. Brooking*, 19 id. 347.

²⁴ *Cutler in re*, 14 Beav. 220; *Kincaid in re*, 1 Drew. 326.

cases where others come into a court of equity to obtain the aid of that court in reducing a fund belonging to her to the possession of the husband, or his creditors or assignees. She may file her bill, by next friend, to be decreed such maintenance out of any fund belonging to her, but which the husband, or those who represent his interest, have the legal right to control.²⁵

15. But if the wife be living apart from her husband, and in a state of adultery, a court of equity will make no order in regard to the payment of the legacy either to the wife or husband; nor will it interpose in any manner to secure a settlement upon the wife out of the legacy, but will leave all the parties to such redress as they may be able to obtain elsewhere.²⁶ But the mere fact that husband and wife live apart without her fault will afford no impediment to a court of equity decreeing support to her.²⁷

16. These settlements upon the wife are decreed as well for the benefit of the children of the marriage as for the wife; but it has been held that no equity attaches on behalf of the children alone, until after an interlocutory decree to that effect.²⁸ The question underwent a very careful examination in a recent case²⁹ before Vice-Chancellor *Kindersley*, where it was declared that this claim or right of the wife to a settlement for the benefit of herself and children impressed no trust upon the property which could be enforced by a court of equity on behalf of the children, after the death of the mother, unless there had been during the life of the mother some decree of the court recognizing the right, or some recognition of it by way of contract between the husband and wife.³⁰

²⁵ *Osborn v. Morgan*, 9 Hare, 432. The origin of the wife's equity to a settlement is here discussed by the learned Vice-Chancellor, the late Lord-Justice *Turner*, and the cases reviewed. The wife can only waive her right to a settlement by coming into court for that purpose. *Id.* See also, to the point of the necessity of the wife appearing in court for that purpose, *Willats v. Cay*, 2 Atk. 67; *Milner v. Colmer*, 2 P. Wms. 639; *Parsons v. Dunne*, 2 Ves. Sen. 60.

²⁶ *Carr v. Eastabrooke*, 4 Vesey, 146; *Ball v. Montgomery*, 2 id. 191; 2 Story, Eq. Jur. § 1426.

²⁷ *March v. Head*, 3 Atk. 720; *Eedes v. Eedes*, 11 Sim. 569.

²⁸ *Winch v. Brutton*, 14 Sim. 379; *Groves v. Perkins*, 6 Sim. 576; *De la Garde v. Lempriere*, 6 Beav. 344, 345.

²⁹ *Wallace v. Auldjo*, 9 Jur. n. s. 687, 1 DeG., J. & S. 643.

³⁰ 4 Am. Law Register, n. s. 9-12, where we have attempted to give the present state of the law upon the point.

* 483 * 17. It seems, that, where no suit is pending to recover the legacy in a court of equity, the executor, in common with other trustees, will be justified in making payment to the husband.³¹ But where a suit is pending in the courts of equity, either by the husband to compel payment of the legacy, or on the part of the wife to compel a settlement, the right of the executor is thereby suspended as to the payment of the legacy until the decree of the court.³²

18. And where a legacy is given to the separate use of a married woman, apart from any control of her husband, she alone can give an effective discharge for the same to the executor; and she may maintain a bill in her own name, by next friend, to recover the legacy, her husband having no interest in it.³³ And where two legacies of £250 each were given severally to two French ladies, the wives of French subjects, the court ordered the payment to be made to the legatees.³⁴

18 *a*. Where there is a deficiency of funds applicable to that class of demands to meet the full payment of general legacies and annuities, they must abate according to their present value. Where the annuitants are still living, the values of their annuities have to be estimated according to the expectation of life fixed by the recognized tables; but all facts transpiring up to the moment of estimating present value will be taken into account, and only existing contingencies subjected to the above rule of estimation. (*a*)

19. There seems to be no question of the right and duty of the executor to set off any debt due the estate from a legatee against any legacy which he may be called to pay. But this right of retainer will not extend to an indebtedness created after the decease of the testator by the legatee giving security to the estate for the indebtedness of other parties.³⁵

³¹ Lord *Eldon*, in *Murray v. Lord Elibank*, 10 Vesey, 84, 90.

³² 2 Wms. Ex'rs, 1280; ante, n. 31; *Doswell v. Earle*, 12 Vesey, 473; *Atcheson v. Atcheson*, 11 Beav. 485. ³³ *Prichard v. Ames*, Turn. & Russ. 222.

³⁴ *Sutherland v. Young*, 5 Law T. N. s. 738.

(*a*) *Potts v. Smith*, Law Rep. 8 Eq. 683, citing *Todd v. Bielby*, 27 Beav. 353; *Heath v. Nugent*, 29 id. 226.

³⁵ *Smee v. Baines*, 29 Beav. 661. But the personal representative has been allowed to retain a bill of costs and expenses for which he has recovered judgment against the legatee in a suit brought against him as executor by the legatee. *Ammon's Appeal*, 63 Penn. St. 284. And the right to retain the debt of a legatee due the estate is not lost by its having been proved in proceedings in

20. It has been held that the executor's right to retain upon debts due the estate, as against legatees, is prior to any right of a mortgagee of the legacy.³⁶ But a legatee, too poor to sue, may assign his legacy; and the fact that he does it for less than it is worth, to one who bought it for the purpose of enforcing payment by suit, will not make the transaction amount to champerty.³⁷ And * the executor can create no new charges upon the * 484 legacy after notice of its assignment or mortgage.³⁸

21. It is no objection to the executor's right to retain against a legatee the amount of a debt due the estate that the same is barred by the statute of limitations.³⁹ But it is not competent for the testator, by charging payments against the legatee, as advances, which really were not so intended or understood between the parties, to create a valid set-off against the legacy.⁴⁰

bankruptcy against the debtor and a dividend received thereon. But the debt of one legatee cannot be retained against his distributive share as next of kin to another legatee who has deceased since the testator. *Stammers v. Elliott*, Law Rep. 4 Eq. 675. But, on appeal, this case was reversed upon the first point, L. R. 3 Ch. App. 195, 199; the Lord Chancellor, *Chelmsford*, being of opinion the debt was extinguished by the proceeding in bankruptcy. But it has been held, in countries where the civil law prevails, that an executor cannot retain the debt of the beneficiary out of an alimentary stipend which the father has provided in his will for his son. *Muir v. Muir*, 22 W. R. 268, L. R. 5 P. C. 66.

³⁶ *Willes v. Greenhill*, 29 Beav. 376.

³⁷ *Tyson v. Jackson*, 30 Beav. 384. It was decided in this case, that where the executor in his final account charged himself with retaining a particular legacy as trustee, and afterwards paid over the residue of the estate, that he had thereby made himself trustee for the legatee in such a manner as to preclude his executor from insisting upon the statute of limitations, or lapse of time, as a bar to the claim.

³⁸ *Stephens v. Venables*, 30 Beav. 625. In this case, where the executor had leased a portion of the testator's property to a legatee, who subsequently mortgaged his legacy, and the mortgagee gave the executor notice of his charge upon the legacy, it was held that the executor might retain from the legacy, as against the mortgagee, all rents accruing before notice of the charge, but not those accruing subsequently. But a mere charge upon real estate devised, for the payment of sums of money to others, does not create such an express trust as will not be barred by the lapse of twenty years, where there has been no payment or recognition of the indebtedness. *Proud v. Proud*, 32 Beav. 234. Mere delay to enforce payment against an executor will not bar the legatee's claim against the estate upon which it is charged in less than twenty years. *Massy in re*, 14 Ir. Eq. n. s. 355.

³⁹ *Coates v. Coates*, 10 Jur. n. s. 532.

⁴⁰ *Hargreaves v. Pennington*, 10 Jur. n. s. 834.

22. And a debt due the estate by bond will be charged upon a legacy to the full extent of the debt and interest, where so directed in the will, although exceeding the penalty of the bond.⁴¹

* SECTION VIII.

THE DELIVERY OF SPECIFIC LEGACIES.

1. The terms of a specific bequest have reference, ordinarily, to the time of testator's decease.
- 2, and n. 4. But a bequest of things in a particular locality will only carry those actually there.
3. Generally, bequest of all of a particular class of testator's estate will have reference to the time of his decease.
4. The executor should collect things specifically bequeathed, and deliver them to legatee.
- 5, and n. 10. Where the bequest is of a certain number out of a larger number, the right of selection is in the legatee.

§ 33. 1. QUESTIONS have often arisen in the English courts, and sometimes in the American, how far a specific legacy shall be confined to the property which the testator possessed at the date of the will.¹ But the general result of all the cases seems to be, that the language of the will shall be understood with reference to the decease of the testator,² unless there is something very specific in the instrument, showing, upon a fair and allowable construction, a different intent.³

2. But it has often been held, that nothing will pass by the bequest of property in a particular house, unless it be actually in the house at the decease of the testator,⁴ or else be sufficiently

⁴¹ *Mathews v. Keble*, Law Rep. 3 Ch. App. 691, reversing s. c. Law Rep. 4 Eq. 467. And the same rule must follow, without any special direction in the will, where the debt and interest do not exceed the penalty of the bond, and interest on the same, from the time of the breach. *Bank of Brighton v. Smith*, 12 Allen, 243; *Weikel v. Long*, 55 Penn. St. 238.

¹ Ante, § 31, pl. 11, where the question is considered as to accessions to the bequest of the residue of an estate after it takes effect.

² Ante, pt. 1, § 30.

³ *Sayer v. Sayer*, 2 Vern. 688.

⁴ *Beaufort v. Dundonald*, 2 Vern. 739. It is here held that it will not vary the construction where goods had been ordered for the particular place, and the carrier contracted with for the transportation, if they do not arrive until after the testator's decease.

identified, as having been intended to be embraced in the bequest, without reference to locality ; as where the testator gave his library *now* in the custody of C., in All-Souls' College in Oxford, and afterwards bought several valuable books, which were placed in his library, it was held that the locality was referred to for the purpose of identifying the particular library.⁵

3. And it has been held, where a particular security is * bequeathed, that the interest due at the decease of the testa- * 486 tor will pass with the bequest.⁶ And in general, under the former English statute, the bequest of a particular class of the testator's property, as "all my debts due," or all my debts due upon "note," or "all my stock" in a certain corporation, if designated by the testator's ownership as *my* debts, &c., was held to embrace only what the testator owned at the date of the will.⁷ But, under the present Wills Act, it has been held to require some plainer indication of intention in order to restrict the bequest to the particular estate owned by the testator at the date of his will.⁸ And in the case of *Douglas v. Douglas*, the learned Vice-Chancellor *Wood* expressed a very decided opinion that the expressions "all my stock," &c., would now be construed as embracing "all at the decease of the testator." But it is, after all, mainly a question of construction upon the probable intention of the testator. And it seems to us very clear that such and similar forms of expression ought to be construed as embracing all of the particular species of such estate owned by the testator at the time of his decease. For although it will be very natural to conjecture, that, originally, the words more probably had reference, in the mind of the testator, to the property then owned by him, as is generally true of all the language of a will, yet still it is also true that most testators are fully aware that the instrument is ambulatory during life, and only becomes operative at the moment of decease, and hence that every specific provision will from time to time come to embrace different estate, as the particular possessions of the testator vary ; and the testator will have this in mind, as these changes occur.

4. It is scarcely necessary to name here that the executor

⁵ *All-Souls' College v. Coddington*, 1 P. Wms. 597.

⁶ *Harcourt v. Morgan*, 2 Keen, 274.

⁷ *Goodlad v. Burnett*, 1 K. & J. 341; *Ashburner v. Macguire*, 2 Br. C. C. 108; *Barton v. Cooke*, 5 Vesey, 461; *Norris v. Harrison*, 2 Madd. 268, 280.

⁸ *Goodlad v. Burnett*, 1 K. & J. 341; *Douglas v. Douglas*, Kay, 400, 405.

should collect things specifically bequeathed, as well as other portions of the estate, and not dispose of them except by delivery to the legatee, unless absolutely required for the payment of debts.⁹

5. It has been held, if the testator bequeath a certain * 487 * number of articles or things out of a larger number belonging to him, that the right of selection belongs to the legatee; as where the testator gave a certain number of shares to A., and another number to B., he owning at the date of the will and at the time of his death a larger number, some of which were paid, and others not, it was held that the legatees, and not the executors, had the right of election out of which class the legacies should be paid.¹⁰

SECTION IX.

PAYMENT OF THE RESIDUE.

1. After payment of debts and general legacies, the remainder goes to the residuary legatee; and if there be none, to the next of kin.
2. Where there are more than one taking as joint-tenants, the shares of those who de cease before payment go to the survivors.
3. But where the bequest is in severalty, so as to create a tenancy in common, there will be no survivorship.
4. Where legacies are given to the survivor or survivors of two or more, that is to be referred to the period of division.
5. That will be the death of the testator, or the period of the estate vesting in possession.
6. In the case of joint-executors, they take in joint-tenancy as a class.
7. Any act, which amounts to an agreement to sever the tenancy, so construed.
8. Insurance made by executor in his own name, for the benefit of the estate, enures for the benefit of the residuary legatee.

§ 34. 1. It is scarcely necessary to say, that, after the payment of the debts and general legacies, the executor must, in general,

⁹ *Clarke v. Ormonde*, Jacob, 108. And if any expense attends the getting in of a specific legacy, it must be borne by the general estate. *Perry v. Meddowcroft*, 4 Beav. 204.

¹⁰ *Jacques v. Chambers*, 2 Coll. 435. And it is here said the same rule as to the right of selection will apply to a bequest of six horses, the testator having twenty in his stable at the time of his de cease. But if the whole number is specifically bequeathed to different legatees in parcels, the selection must be made by the executor, or by the court of probate, or by appeal to a court of equity. The rights of the legatees will be precisely equal.

pay what remains to the residuary legatee.¹ And, as we have before stated, it will make no difference that the legatee deceases between the time of the decease of the testator and that of payment: the legacy will go to his personal representatives.² If there be no residuary legatee, what remains * undisposed of * 488 under the will goes to the next of kin as intestate estate.

2. We have sufficiently discussed the question of what constitutes, and also the extent of, a residuary bequest.³ It may be proper to state, that where the residuary bequest is to more than one person, as joint-tenants, and one or more die before the time of payment or the severance of their interest, the share of the deceased tenant will go to the survivors.⁴

3. But it is otherwise where the bequest is in severalty, so as to create a tenancy in common. In such case there will be no survivorship, but the share of any tenant in common who predeceases the testator will lapse into the residue; and if such tenant in common decease after the death of the testator, and before payment, his share will go to his next of kin.⁵

4. But there is a class of cases where the terms of the bequest seem to create a tenancy in common, in the first instance, but followed by words of survivorship; as where the residue is given to two or more, to be equally divided between them, or to the survivors or survivor of them.⁶ The difficulty arises in this class of cases, to determine the period to which the words of survivorship shall be referred. In *Cripps v. Wolcott*,⁷ Sir *John Leach*, Vice-Chancellor, said: "It would be difficult to reconcile every case upon this subject. I consider it, however, to be now settled, if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no

¹ 2 Wms. Ex'rs, 1307, 4th Am. ed. by Fish.

² *Brown v. Farndell*, Carth. 51.

³ Ante, § 6.

⁴ *Webster v. Webster*, 2 P. Wms. 347; *Page v. Page*, 2 id. 489; *Painter v. Salisbury*, cited in *Bennet v. Batchelor*, 1 Ves. Jr. 67; *Peat v. Chapman*, 1 Ves. Sen. 542.

⁵ *Bagwell v. Dry*, 1 P. Wms. 700. In a recent English case, it is said that a legacy to several persons, and their executors and administrators respectively, makes them tenants in common. *Moore in re*, 31 L. J. Ch. 368.

⁶ 2 Wms. Ex'rs, 1319.

⁷ 4 Madd. 11, 15. See also *Ridgeway v. Underwood*, 67 Ill. 419.

special intent to be found in the will, that the survivorship is to be referred to the period of division."

5. And it is here said, that, if there be no previous interest, the period of division is the death of the testator, and the survivors at that time will take the bequest.⁸ But if there be a previous * 489 life-estate, the period of division will be the death of * the tenant for life.⁹ This rule seems now to be fully established,¹⁰ notwithstanding some exceptional cases, and considerable hesitation on the part of eminent judges.¹¹

6. But it seems fully settled, as already intimated, that where the bequest is made to joint-executors as a class, and one or more of them predecease the testator, the whole will go to the survivors.¹² And if one or more of the executors decess after the death of the testator, and before the period of division or any severance of the joint-tenancy in the residue, the share of such deceased executor or executors will go to the survivors.¹³

7. It is sometimes a question of considerable difficulty to determine what shall amount to a severance of the joint-tenancy in cases of the bequest of personal property. The question is considerably discussed by Lord *Brougham* in the case of *Gould v. Kemp*.¹⁴ His lordship's conclusion here is, that as the courts of equity do not favor the existence or continuance of joint-tenancies, in consequence of the unequal result brought about by the

⁸ *Stringer v. Phillips*, 1 Eq. Cas. Ab. 293, pl. 11.

⁹ *Russell v. Long*, 4 Vesey, 551; *Daniell v. Daniell*, 6 Vesey, 297; *Jenour v. Jenour*, 10 Vesey, 562. The cases of *Roebuck v. Dean*, 2 Ves. Jr. 265, *Perry v. Woods*, 3 Vesey, 204, do not conform to this view.

¹⁰ *Dorville v. Wolff*, 15 Sim. 510; *Davies v. Thorns*, 3 DeG. & Sm. 347; *Neathway v. Reed*, 3 DeG., M. & G. 18; *Carver v. Burgess*, 18 Beav. 541; *Eaton v. Barker*, 2 Coll. 124.

¹¹ Lord *Cottenham*, in *Wordsworth v. Wood*, 4 My. & Cr. 641. This question is very ably discussed by the same learned judge in *Barber v. Barber*, 3 My. & Cr. 688, and the proposition maintained, that if the bequest be to the persons constituting a class, as individuals, naming them separately, there will be no survivorship. But it is otherwise where the gift is to the same persons as a class. His lordship here held the share of the deceased legatee to belong to the next of kin, as estate undisposed of under the will.

¹² *Knight v. Gould*, 2 My. & K. 295; s. c. affirmed by Lord Chancellor *Brougham*, C. P. Cooper's Sel. Cas. 240.

¹³ *Frewen v. Relfe*, 2 Br. C. C. 220; *Baldwyn v. Johnson*, 3 Br. C. C. 455; *Griffiths v. Hamilton*, 12 Vesey, 298.

¹⁴ 2 My. & K. 304.

accident of survivorship, it is proper to hold that any act or agreement of the joint-tenants which amounts to a free and unqualified consent to treat the tenancy as severed shall be so treated, and enforced in a court of equity;¹⁵ and it * was here de- * 490 cided, accordingly, that a letter written by one of the tenants to the other not long before his death, engaging to secure to the family of the latter, in any way he might desire by his will, a moiety of the joint-fund, will amount to a severance.

8. The residuary legatees may sue for and recover of the executor the amount of an assurance made by such executor in his own name for the benefit of the estate, and which has become forfeited.¹⁶

SECTION X.

THE RIGHT OF THE EXECUTOR WHERE THERE IS NO RESIDUARY LEGATEE.

1. In England, the executor formerly took the undisposed-of residue.
2. In America always, and in England now, he holds it as trustee for next of kin.
3. Testator cannot hinder the next of kin taking it by mere negative words.

§ 35. 1. It seems to have been the settled doctrine of the English law from an early day, that as all the personalty devolved, in the first instance, upon the executor, if there were no residuary legatee, he should retain it to his own use, after paying the debts of the decedent and meeting all charges created by the will.¹ But, even there, the courts have been ingenious to invent excuses to escape from the rule;² and finally it was declared by

¹⁵ *Frewen v. Relfe*, 2 Br. C. C. 220; *Swift v. Roberts*, 3 Bur. 1488; Lord *Hardwicke*, in *Partriche v. Powlet*, 2 Atk. 54. And it seems it will make no difference that the agreement is for something to come into operation in futuro; as where one of the joint-tenants made a lease of his moiety for years, to commence from his death, if his co-tenant shall so long live. *Clerk v. Clerk*, 2 Vern. 323. And a joint-devise to two or more, with the words "share and share alike," was held to create a severance in regard to the income of an estate held by trustees. *Provenchere's Estate*, 1 Legal Gazette, Rep. 68.

¹⁶ *Colburn v. Lansing*, 46 Barb. 37.

¹ *Attorney-General v. Hooker*, 2 P. Wms. 338; *Urquhart v. King*, 7 Vesey, 225.

² As where the executor was made a legatee by the will, this was held a

statute,³ that in all such cases the executor shall be decreed, by the courts of equity, to be a trustee for the party entitled to the estate under the statute of distributions, so that the numerous decisions upon the point have there now become comparatively of no importance.

* 491 * 2. It is, and always has been, as far as we know, the general rule in the American states, that the executor held the residue of the estate undisposed of by the will as trustee for the next of kin. This was so declared at an early day by express statutes in many of the states.⁴

3. It has been held, that the testator cannot, by negative words, exclude his next of kin from taking, beneficially, all personalty undisposed of by the will. He must give it to some one else, if he desires the next of kin not to have it.⁵

clear indication that he was not intended to have the residue. *Urquhart v. King*, 7 Vesey, 225. And there are many other cases, and evidence may there be received to rebut these presumptions. *Langham v. Sanford*, 17 Vesey, 435, 442.

³ 11 Geo. IV. and 1 Wm. IV. ch. 40.

⁴ Mass. Stat. 1783, ch. 24, § 10. By *Parsons*, Ch. J., "The executor is now in all cases trustee of the undisposed residue for the next of kin," in *Hays v. Jackson*, 6 Mass. 149, 152, 153. The fact that a pecuniary legatee for life is appointed one of the executors will not have the effect to enlarge his interest. *Browne v. Cogswell*, 5 Allen, 556. But a bequest to the testator's grandson in trust, to perform the conditions of the will, and naming him one of the executors, was held to entitle him to the unexpended portion of the bequest beneficially. *Clarke v. Hilton*, Law Rep. 2 Eq. 810. See *Wells v. Mitchell*, 39 Miss. 800; *Bird v. Harris*, 18 W. R. 374, L. R. 9 Eq. 204.

The same rule seems to have prevailed in Pennsylvania from an early day. *Wilson v. Wilson*, 3 Binney, 557. See also Fish's note to 2 Wms. Ex'rs, 1329.

⁵ *Johnson v. Johnson*, 4 Beav. 318. See also *Bird v. Harris*, L. R. 9 Eq. 204.

* CHAPTER V.

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CHARITABLE USES AND TRUSTS.

1. English statutes in regard to superstitious uses.
2. Aimed chiefly at the usages of the Roman Church.
3. Such bequests void, as being against public policy.
4. The English rule not applicable in America.
5. Uses solely for benefit of donor, or for specific purpose, where void, the bequest will revert to next of kin, or residuary legatee.
- n. 4. But where general charitable intent, court will execute it.
6. Bequests for the support of the interests of the testator not regarded as superstitious.
7. Roman Catholics and Jews, now, on same footing in England as Dissenters.
8. The statute has not rendered valid superstitious uses, or those against public policy.
9. Impracticable to define charitable uses with precision.
10. Statute of Elizabeth forms the basis of equity jurisdiction on that subject.
11. Subjects embraced in that statute.
12. Enumeration of subjects held charitable under the statute.
13. Objects of charitable trust not confined to the poor exclusively.
14. Subjects of bequests not regarded as charitable.
15. Bequests for general utility, or for the benefit of certain persons as they need, not charitable.
16. How far the object must be general to create a public charity.
17. Devise to dissenting ministers good for life, but devise over not charitable.
18. Distribution of fund among different objects will sometimes be made by the court.
19. Distinction where contingency applies to bequest, or only to the distribution.
20. Some of the cases indicate, that, if discretion is reposed in trustee, court will not exercise it.
21. Courts of equity will only recognize the validity of trusts which they can execute.
22. The policy of the early English cases and statutes was favorable to charitable uses.
23. Origin and provisions of the statute of mortmain.
24. Courts first inclined to give the statute a very wide extension.
25. How far shares in joint-stock companies come within that statute.
26. Railway debentures not within the statute. No such statute in American states generally.
27. Lands devised to charity do not vest: the heir may recover at law.
28. How far bequests to charity are avoided by being associated with others which are void.
29. Equity will not execute an illegal trust for charity; but, after long acquiescence all will be held regular.

- * 493 * 30. Any secret trust on the part of the devisee which is illegal will avoid the devise.
31. Such a trust, with one of two or more joint-devisees, will avoid the devise as to him.
32. Equity will not marshal assets in favor of charity, so as to avoid illegality.
33. But will apply the estate ratably to all the objects embraced in the bequest.
34. The constructions against the effect of charitable bequests, in the English courts, very marked.
35. The spirit of the statute of mortmain and its construction evince want of liberality and comprehension.
36. The statute of mortmain does not extend to Scotland, Ireland, or the Colonies.
37. Personal estate may in England be applied to charity indefinitely. Courts there favor it.
38. Enumeration of the objects of charity, where the courts have decreed a substitution of others.
39. In all these cases, bequests of like character for any other objects would be void for uncertainty.
40. But charitable bequests for particular objects will not be administered *cy pres*.
41. The distinction between the classes of charities administered by the chancellor and by the crown not important here.
42. The distinction depended upon whether the donor had appointed trustees.
43. But where trustees decline acting, the court supplies others in their place.
44. And the result, proving the fund larger than testator expected, will make no difference.
45. Court will select a trustee most interested in carrying forward the object.
46. The Attorney-General not a necessary party, where the fund goes into the general funds of a charitable institution.
47. Court will generally order a fund paid over, if dedicated to foreign charity.
48. Gifts over, where the primary gift to charity fails for illegality, good.
49. Where an excess accrues in the income of the fund, will go to same charity.
50. Unless the donor give a scheme which does not exhaust the income.
51. Colleges and charitable institutions, donees of charitable funds, applied such excess to their general uses.
52. Courts of equity sometimes vary the proportions of expenditure.
53. If donee is required to perform duties, the surplus, ordinarily, goes to him; not always.
54. Gift of the surplus to donee carries any increase of income.
55. Different American states declared the statute of 43 Eliz. in force there about same time.
- n. 135. History of the equitable jurisdiction over charitable uses in the United States.
- n. 141. It is now clear that equity had jurisdiction of charitable uses at common law.
56. It was held in Kentucky that a Shaker community is a charity!
57. Such an association is intensely private, selfish, and uncharitable.
58. The United States Supreme Court recognize the law of charitable trusts.
59. That court seemed at one time to suppose there existed no common-law charitable jurisdiction.
60. Some of the states supply a trustee, and aid him in the discharge of his trust.
61. Statement of some of the subjects held charitable in America.

- * n. 151. Extended review of the American cases where religious charities are recognized. * 494
- 62. Some of the American courts go great lengths in carrying charitable trusts into effect.
- 63. Trustees of a charity have vested rights not subject to legislative control.
- 64. American courts adhere to the organization of the donee and the doctrine of the donor.
- 65. The doctrine of cy pres not adopted to the full extent in some of the states.
- 66. Indefiniteness is the peculiarity which distinguishes charitable trusts.
- n. 159, 165. But in many of the states, indefinite charities have been held void.
- 67. Statement of a case in New Hampshire where charitable trusts are upheld.
- 68. In New York, real estate cannot be devoted to charitable uses.
- 69. And general indefinite charities are not upheld there.
- 70. It is no valid objection to a charitable bequest that it tends to create a perpetuity.
- 71. Accumulation not allowed beyond the term fixed for vesting executory devises.
- n. 173. The law of remoteness in regard to executory devises stated.
- 72. The distinction between charities administered in chancery and by the crown further discussed.
- 73. The Court of Chancery will not, ordinarily, appoint trustees to carry into effect an indefinite charitable purpose, where none have ever before existed.
- n. 179. *Owens v. The Missionary Society of M. E. Church*, 4 Kernan, 380.
- 74. The case of Girard's Orphan College, and decisions in regard to it.
- n. 181. Vindication of Girard's charity. Religion taught in American schools.
- 75. Construction of the bequest in regard to the extent of the word "orphan" and of the limits of the city of Philadelphia.
- 76. Charitable corporations hold property exempt from special legislative control.
- 77. Chancellor *Kent's* definition of the extent of charitable trusts.
- 78. Lord *Eldon's* authority upon the same subject.
- 79. The rule as defined in *Story's Equity Jurisprudence*.
- 80. The English courts of equity have declined to maintain indefinite trusts not exclusively charitable.
- 81. Objects of charity may be selected by trustees in Connecticut.
- 82. The costs of all parties come out of the fund, where there was reasonable doubt.
- 83. Trusts, and especially charitable ones, do not come within statutes of limitations. Not barred by lapse of time.
- 84. Lapse of time of great weight in fixing the nature and extent of trust.
- 85. Of great importance in removing doubts as to true construction.
- 86. The same rule applied in Massachusetts.
- 87. Long contemporaneous usage cannot be disregarded, except on clearest proof.
- 88. This rule may determine the application of any surplus income.
- 89. The rule applied to statutes of limitation.
- 90. The same rule applied in New Hampshire.
- 91. Proper cause for changing trustees, that they are not within the control of the court.
- 92. Charities embracing estates in different states, where the trust is declared void in one state, cannot be upheld in other states.

§ 36. 1. BY force of certain English statutes,¹ lands devised, or otherwise disposed of, for what were declared superstitious

¹ 23 Hen. VIII. ch. 10; 1 Edw. VI. ch. 14.

* 495 uses, * were forfeited to the crown. The uses enumerated are for the maintenance of persons to pray for the souls of dead men in purgatory; to maintain perpetual obits, lamps,² &c.

2. These statutes were aimed at such usages of the Roman Church as were condemned by the Protestant Reformation. But there is no express English statute making superstitious uses in general void, and the 23 Hen. VIII. relates in terms only to assurances of land to churches and chapels.³

3. But although there is no present English statute rendering the disposition of personal property, or all dispositions of property, for superstitious uses, void, the courts have nevertheless held, in all such dispositions of property, whether real or personal, the uses to be void upon general principles of public policy; and we understand this to be the general view of the law in the American states. But as all religions here receive equal toleration, it may deserve consideration, how far many of the uses declared superstitious by the English courts of equity can fairly be so regarded here.

4. The decision of Sir *William Grant*, in *Cary v. Abbot*,³ that a residuary bequest for the purpose of educating and bringing up poor children in the Roman Catholic faith was void, would scarcely be adopted in this country, where there was no positive legislative or constitutional prohibition.⁴

² Porter's Case, 1 Co. 22. This was in the 35 Eliz., before the enactment of the statute of charitable uses, 43 Eliz.; and it is here said: The statute 23 Hen. VIII. extends not to good uses, nor doth it make the conveyance void, or give entry, but makes the use void. Any person may, at this day, give lands, &c., "for the finding of a preacher, maintenance of a school, maimed soldiers, poor people, reparation of churches, highways, bridges, marriage of poor maids," in terms almost the same as those enumerated in 43 Eliz.

³ Sir *William Grant*, in *Cary v. Abbot*, 7 Ves. 490, 495. The other English statutes in regard to charitable devises and other dispositions of real or personal estate were either retrospective, as that of 1 Edw. VI.; or else only emporary, as 1 Geo. I. c. 55.

⁴ *Philadelphia v. Elliott*, 3 Rawle, 170; *Babb v. Reed*, 5 Rawle, 151. The uses to which such charitable provisions in the English courts have been applied seem a still more marked perversion than if they had been declared simply void, and allowed to fall back into the general residuum of the estate, or go to the next of kin. But the rule of the English courts of equity is, that if the bequest indicate a general charitable intention, but the object to which it is to be specifically applied is against the policy of the law, the court will lay hold of the charitable intention, and execute it in conformity with the

* 5. If the uses declared are solely for the benefit of the * 496 donor (as to say masses for her soul), and also where no general charitable intent is indicated, and the specific purpose fails for illegality, no new scheme of charity can be devised by the courts, but the bequest goes to the party entitled, if no such devise had been made.⁵

6. It was decided that bequests for the benefit of poor ministers ejected from their livings at the Restoration, and to circulate Baxter's "Call to the Unconverted," were void, as being superstitious.⁶ But this case was reversed by the commissioners. It owed its existence to the exciting character of the times. It is now perfectly well settled that such devises are valid, — even such as have for their object the propagation of the doctrines of dissent, although at variance with the doctrines of the Established Church.⁷ * And the doctrines of the Unitarians are not * 497

law: and although the natural and professed course of the courts is to come as near the declared use as the policy of the law will allow, some strange perversions of the intention of the donor have occurred in this mode of administering his charity; as where a bequest to found a Jew's synagogue has been transferred to the benefit of a foundling hospital. 2 Story, Eq. Jur. § 1168; *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Mer. 55, 100. See opinion of *Nicholas*, Justice, in *Gass v. Wilhite*, 2 Dana, 170, as to superstitious uses in America. In *Vander Volgen v. Yates*, 3 Barb. Ch. 242, it was held that a conveyance of land to A. and seven other persons by name, in fee, but in trust for the benefit of thirteen persons named, being members of a lodge of Freemasons, and all others who then were or might thereafter become members of the lodge for ever, vested the legal title in the grantees, in trust for the charitable use of the lodge for ever; and that there remained no resulting trust to the grantor or his heirs upon the failure of issue of the grantees, the court of chancery supplying a trustee in such cases. But, so long as any one survived, he held the legal title, which would not pass under the statute of uses to the cestuis que trustent, the statute only executing such uses as had no special trust or confidence attached to them, and where the transfer of the legal title will effect the whole purpose of the grant.

⁵ *West v. Shuttleworth*, 2 My. & K. 684; 2 Story, Eq. Jur. § 1182; *Attorney-General v. Hurst*, 2 Cox, 364; *Corbyn v. French*, 4 Ves. 418; *De Garcin v. Lawson*, 4 Ves. 433, in note; *De Themmines v. De Bonneval*, 5 Russ. 288. See also *Attorney-General v. Ward*, 3 Vesey, 327.

⁶ *Attorney-General v. Baxter*, 1 Vern. 248; s. c. nom. *Attorney-General v. Hughes*, 2 id. 105; s. c. 1 Eq. Cas. Ab. 96, pl. 9.

⁷ *Attorney-General v. Pearson*, 3 Mer. 353; *Attorney-General v. Hickman*, 2 Eq. Cas. Ab. 193, pl. 14; 1 Jarman, 190, and note. The intimations of Lord Tenterden, in *Doe v. Hawthorn*, 2 B. & Ald. 96, that a trust to build a

regarded as any exception to the rule in favor of dissent in England.⁸ So also of a bequest for the benefit of poor Irvingite ministers,⁹ or to the Baptist minister of a particular chapel.¹⁰

7. By the acts sometimes denominated "Roman Catholic Emancipation," or those passed about the same date, and forming part of the same general movement of reform,¹¹ bequests for the support of the Roman Catholic religion are legalized. This statute places Roman Catholics, "in respect of their schools, places for religious worship, education, and charitable purposes, in Great Britain, and the property held therewith," &c., upon the same footing as Protestant Dissenters. The act was not to extend to any pending litigation; but in other respects it was retrospective, so as to apply to a will where the testator deceased before the passing of the act.¹² The same indulgence has, by statute,¹³ now been extended to Jews. And in Ireland, a bequest to say masses for testator's soul was held valid.¹⁴

8. But the Roman Catholic Relief Act has not rendered gifts to superstitious uses valid in England, such as masses for the repose of the testator's soul.¹⁵ And the same rule must apply to all bequests for uses against the spirit and policy of the existing constitution of civil government, as in the English case of *De * 498 Themmines v. De Bonneval*,¹⁶ where a trust was created * for publishing a book, the professed purpose of which was to

chapel for the use of Protestants, "assembling under the patronage of the trustees of the late Countess of Huntingdon's College," might perhaps be regarded as superstitious, has not been regarded with favor by the profession. 1 Jarman, 190, and note.

⁸ *Shrewsbury v. Hornby*, 5 Hare, 406.

⁹ *Attorney-General v. Lawes*, 8 Hare, 32.

¹⁰ *Attorney-General v. Cock*, 2 Ves. Sen. 273.

¹¹ 2 & 3 Will. IV. ch. 115, § 1.

¹² *Bradshaw v. Tasker*, 2 My. & K. 221. But this case was doubted by Sir E. Sugden, in *Attorney-General v. Drummond*, 1 D. & War. 353, 380.

¹³ 9 & 10 Vict. ch. 59.

¹⁴ *Read v. Hodgens*, 7 Ir. Eq. 17.

¹⁵ *West v. Shuttleworth*, 2 My. & K. 684.

¹⁶ 5 Russ. 288. See also *Briggs v. Hartley*, 14 Jur. 683. So in a very recent case (*Blundell in re*, 30 Beav. 360), where a fund was devised to trustees, to pay the income to Roman Catholic priests, upon condition of their saying masses for the repose of the soul of the founder, the bequest was held void, and the fund ordered to be paid to the representatives of the founder. So also, where the object of a charitable trust ceases to exist before the death of the testator, the fund will go to the next of kin. *Langford v. Gowland*, 9 Jur.

prove the supremacy of the Pope in all ecclesiastical matters, as paramount to that of all temporal sovereignty, which was held void. This case arose before the date of the statute, but was decided upon general principles of public policy, which are not affected in this particular by the statute.

9. There can be no precise and perfect definition of a charitable use. Lord *Hardwicke's* definition in *Jones v. Williams*,¹⁷ "a gift to a general public use, which extends to the poor as well as to the rich," comes as near the truth, probably, as any one; and this was here attempted to be vindicated, by the statute of Elizabeth, in its application to a bequest of £1,000 to build an aqueduct or water-works, and of £10 annually to keep the "water-works in good order," since it was supposed to have some analogy to "repairs of bridges," which is one of the uses named in the statute, and declared a legal charity.

10. Since the statute of charitable uses,¹⁸ charity, in the sense of the courts of equity in England, has accordingly been restricted to such subjects as are there enumerated, and others which have been deemed to come within its reasonable spirit and intendment.¹⁹

n. s. 12. So also in case of a devise of real estate upon a secret trust, to apply the income to charity, the heir at law will be entitled. *Sweeting v. Sweeting*, 12 W. Rep. 239; s. c. 10 Jur. n. s. 31.

¹⁷ Amb. 651.

¹⁸ 43 Eliz. ch. 4.

¹⁹ 2 Story, Eq. Jur. §§ 1155-1164. And the same limitation, substantially, has obtained in the American states, in some of which this jurisdiction in the courts of equity is attempted to be maintained upon the basis of the common law; and in others the jurisdiction is placed expressly upon the English statute, and the assumption that it has been adopted as a portion of the common law in those states. *Burbank v. Whitney*, 24 Pick. 146; *Going v. Emery*, 16 Pick. 107; *Burr's Ex'rs v. Smith*, 7 Vt. 241; 1 Jarman 197 (Perk. ed. 1859). Mr. Tudor says (*Tudor's Ch. Trusts*, 103): "The statute of Elizabeth still furnishes us with the legal definition of what is to be considered a charity; and where a gift is not a charity within that statute, no information will lie at the suit of the Attorney-General to enforce it;" citing Story, Eq. Jur. § 1163; *Attorney-General v. Hlewer*, 2 Vern. 387. Here the Lord-Keeper said: "This, not being a free school, is not a charity within the provisions of the statute, . . . and consequently the inhabitants have not a right to sue in the name of Mr. Attorney-General. If the lord of a manor should erect a mill, and convey it to trustees, to the intent the inhabitants might have the convenience of grinding there, the inhabitants should not be admitted to sue here in Mr. Attorney-General's name." By the terms of the statute, it was not to extend to any municipal or other corporation where special governors were appointed, or to any college, hospital, or free school, which had special visitors or governors or overseers

In *Morice v. The Bishop of Durham*,²⁰ Sir *William Grant*, * 499 * M. R., thus defines public charity: "That word, in its widest sense, denotes all the good affections men ought to bear towards each other; in its most restricted and common sense, relief of the poor. In neither of these senses is it employed in this court. Here its signification is derived chiefly from the statute of Elizabeth. Those purposes are considered charitable which that statute enumerates, or which by analogies are deemed within its spirit and intendment; and to some such purpose every bequest to charity, generally, shall be applied. But it is clear, liberality and benevolence can find numberless objects not included in that statute in the largest construction of it." The commentary of Mr. Tudor, a late English writer upon this subject, gives a very clear view of gifts which may be considered charitable, as coming within the statute of Elizabeth. It seems generally conceded that the courts of equity in England held an independent, original, and inherent jurisdiction with respect to charitable trusts, before the statute of charitable uses.

11. The following subjects are specifically enumerated in the statute of Elizabeth as charitable: The relief of aged, impotent, and poor people; maintenance of sick and maimed soldiers and mariners; schools of learning, free schools, and scholars in universities; repair of bridges, ports, havens, causeways, churches,

appointed by their founders. And the jurisdiction of the Ordinary was not to be interfered with. Tudor's Ch. Trusts, 104, 105. But the Commissioners under the statute of Elizabeth were not deprived of their jurisdiction where the visitors were also the trustees of the charity, or where the power of visitation given by the founder was limited, and not general. See *Kirkby v. Ravensworth Hospital*, 8 East, 221; s. c. 15 Vesey, 305; *Attorney-General v. Talbot*, 3 Atk. 662, 673; *Attorney-General v. Governors of the Foundling Hospital*, 2 Ves. Jr. 42. The proceedings before the Commissioners under the statute of Elizabeth are reported in *Duke's Charitable Uses*. Mr. Tudor says: "Of these proceedings, many were not very consonant with justice." And it is here added, that the review of the proceedings before the Chancellor was found so puzzling that the commissions ceased to be issued; and it was by general acquiescence resolved to return to the earlier mode of an information by the Attorney-General. The last commission was issued in *Kirkby v. Ravensworth Hospital*, supra. And the general commission appointed by 58 Geo. III., ch. 91, specially exempts from the supervision of such board "all charities having special visitors, governors, or overseers;" but the Commissioners were to report the names of such charities. Tudor, 107.

²⁰ 9 Vesey, 399, 405.

sea-banks, and highways; education and preferment of orphans; * the relief, stock, or maintenance for houses of * 500 correction; marriages of poor maids; supportation and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners or captives; and aid or ease of poor inhabitants; concerning payment of fifteens, setting out of soldiers, and other taxes.²¹

12. These several objects have been a good deal extended by construction, and, in some instances, carried quite one side of the fair import of the terms used in the statute. The following objects have been declared charitable: For the erection of water-works; ²² for the "good" of a place; ²³ for the general improvement of a town; ²⁴ for the establishment of a life-boat,²⁵ or a botanical

²¹ 1 Jarman (ed. 1861), 192. See *Da Costa v. De Pas*, Amb. 228; s. c. 1 Dick. 258; *Attorney-General v. Cock*, 2 Ves. Sen. 273, 276; *Moggridge v. Thackwell*, 7 Vesey, 36, where this subject is very extensively discussed by Lord *Eldon*, and the early cases reviewed. See also *Straus v. Goldsmid*, 8 Sim. 614, where a bequest intended to enable persons professing the Jewish religion to observe its rites was held good. The second edition of Mr. Tudor's excellent work on the Law of Charitable Trusts contains many valuable suggestions upon this important subject. This writer alludes to the contrast in spirit between the statute of charitable uses and the favorable construction which it had received by the courts, and the more strict construction of the statute of mortmain, as attributable, to a large extent, to the fact that the former was principally "moulded into shape by ecclesiastical tribunals," while the statute of mortmain was the result of the "preponderance of the lay element in the legislature;" and that the statute was passed with the avowed purpose of arresting what was declared to be a "public mischief," which "had of late greatly increased by many large and improvident alienations or dispositions, made by languishing and dying persons and others, to uses called charitable, to take place after their deaths, to the disherison of lawful heirs." The opinion of Lord *Eldon*, in *Moggridge v. Thackwell*, 2 Vesey, 36, 88, is the best commentary, perhaps, upon the latter statute. Its great length precludes our transferring it to our pages.

²² *Jones v. Williams*, Amb. 651.

²³ *Attorney-General v. Earl of Lonsdale*, 1 Sim. 105.

²⁴ *Howse v. Chapman*, 4 Vesey, 542; *Attorney-General v. Heelis*, 2 Sim. & Stu. 67. It was held that a devise of the residue of one's estate to the "government of Bengal, to be applied to charitable, beneficial, and public works at and in the city of Dacca, in Bengal, for the exclusive benefit of the native inhabitants, in such a manner as they and the government might regard as most conducive to that end," was a valid charity. *Mitford v. Reynolds*, 1 Phill. C. C. 185.

²⁵ *Johnston v. Swann*, 3 Madd. 457.

* 501 garden;²⁶ to the widows and orphans,²⁷ or the poor * inhabitants, of a parish;²⁸ in aid of the poor-rates;²⁹ for the widows and children of seamen belonging to a town;³⁰ to poor and credible industrious persons residing at A. with two children or upwards, or above fifty years of age, maimed, or otherwise unable to get a living;³¹ or for preaching a sermon, keeping the chimes of the church in repair, playing certain psalms, and paying the singers in church;³² building an organ-gallery in a church;³³ endowing or erecting a hospital;³⁴ for deserving literary men who have been unsuccessful;³⁵ for letting out land to the poor at a low rent;³⁶ for the increase and encouragement of good servants;³⁷ for the benefit of ministers of the gospel of any denomination;³⁸ for the benefit, advancement, and propagation of learning in every part of the world;³⁹ to erect an institution for the cure of diseases in quadrupeds and birds useful to man, and to maintain a lecturer;⁴⁰ and, indeed, gifts for any purpose, either of a public⁴¹ or religious⁴² character, have been held charitable.

²⁶ *Townley v. Bedwell*, 6 Vesey, 194.

²⁷ *Attorney-General v. Comber*, 2 Sim. & Stu. 93.

²⁸ *Attorney-General v. Clarke*, Amb. 422; *Paice v. Archbishop of Canterbury*, 14 Vesey, 364; *Thompson v. Corby*, 27 Beav. 649.

²⁹ *Doe v. Howells*, 2 B. & Ad. 744.

³⁰ *Powell v. Attorney-General*, 3 Mer. 48.

³¹ *Russell v. Kellett*, 3 Sm. & Gif. 264.

³² *Turner v. Ogden*, 1 Cox, 316; *Durour v. Motteux*, 1 Ves. Sen. 320.

³³ *Adnam v. Cole*, 6 Beav. 353.

³⁴ *Pelham v. Anderson*, 2 Eden, 296; *Attorney-General v. Bishop of Chester*, 1 Br. C. C. 444; *Attorney-General v. Kell*, 2 Beav. 575.

³⁵ *Thompson v. Thompson*, 1 Coll. C. C. 381, 395.

³⁶ *Crafton v. Frith*, 15 Jur. 737.

³⁷ *Loscombe v. Wintringham*, 13 Beav. 87.

³⁸ *Attorney-General v. Hickman*, 2 Eq. Cas. Ab. 193, pl. 14; *Same v. Gladstone*, 13 Sim. 7; *Same v. Cock*, 2 Ves. Sen. 273; *Same v. Lawes*, 8 Hare, 32; *Grieves v. Case*, 4 Br. C. C. 67; *Thornber v. Wilson*, 3 Drew. 245; s. c. 4 id. 350. But such gift to the person is not a charitable gift, it would seem. Id. 357.

³⁹ *Whicker v. Hume*, 14 Beav. 509; s. c. 1 DeG., M. & G. 506; s. c. 7 Ho. Lds. Cas. 124.

⁴⁰ *London University v. Yarrow*, 23 Beav. 159; s. c. 1 DeG. & J. 72; *Marsh v. Means*, 3 Jur. N. s. 790.

⁴¹ *Lord Cottenham*, in *Attorney-General v. Aspinall*, 2 My. & Cr. 617, 622, 623; *Attorney-General v. Corporation of Shrewsbury*, 6 Beav. 220; *Same v. Corporation of Carlisle*, 2 Sim. 437; *British Museum v. White*, 2 Sim. & Stu. 594; ante, § 5, pl. 55.

⁴² *Attorney-General v. City of London*, 1 Ves. Jr. 243; *Powerscourt v.*

* 13. It is evident, from an examination of the cases, that * 502 gifts to charitable uses are not confined to the poor, although

Powerscourt, 1 Molloy, 616; *Baker v. Sutton*, 1 Keen, 224, 232; *Attorney-General v. Stepney*, 10 Vesey, 22; *Townsend v. Carus*, 3 Hare, 257; *Lloyd v. Lloyd*, 2 Sim. n. s. 255. So also of stock to government, "in exoneration of the national debt." *Newland v. Attorney-General*, 3 Mer. 684; *Thellusson v. Woodford*, 4 Vesey, 227; *Nightingale v. Goulburn*, 5 Hare, 484. So bequests for repairing and adorning a church have been held valid charitable uses. *Attorney-General v. Ruper*, 2 P. Wms. 125. And a bequest for poor dissenting ministers, where there were three distinct societies of dissenters, was held not void for uncertainty, but to go equally to the ministers of each society. *Waller v. Childs, Ambler*, 524; s. p. *Bishop Gore's Charity*, 4 Dru. & War. 270. Bequests to enable persons professing the Jewish religion to observe its rites is good. *Straus v. Goldsmid*, 8 Sim. 614. And a bequest to the governors of a charity institution for the encouragement of good pursuits, there being no such society found, was held not to fail, but to create a valid charity, which the courts of equity will administer. *Loscomb v. Wintringham*, 7 Eng. L. & Eq. 164. So a bequest to A. and B, to be by them applied to charitable purposes, according to the testatrix's instructions as deposited with A. The instructions were only verbal, and the fund to be managed according to A.'s discretion. It was held a good bequest, and referred to a Master to settle a scheme. *Com. Charitable Donations v. Sullivan*, 1 D. & W. 501; s. p. *Bishop of Hereford v. Adams*, 7 Vesey, 324. But a bequest to some promising young man of good talents and of the Baptist order, to be selected by the testator's executor, was held void for uncertainty. *Hester v. Hester*, 2 Ired. Eq. 330. But a bequest "in aid of objects or purposes of charity or benevolence, public or private," was construed to mean general relief for the poor, either through public institutions or by almsgiving through the agency of individuals, and so upheld as a good charitable use. *Saltonstall v. Sanders*, 11 Allen, 446. This seems to us an exceedingly sensible view, and one far more creditable to the court than to load themselves with such a burden of doubtfulness and uncertainty, the result of their own acuteness, as to break down under the weight, and thus defeat the purpose of the testator, and bring the law into discredit, by an affectation of lameness, which does not, in fact, belong to it, when properly administered. s. p. *Williams v. Pearson*, 38 Ala. 299; *McLain v. School Directors*, 51 Penn. St. 196. And a devise of land and money in trust for establishing a school to be taught by females, in which no book of instruction should be used except the Bible and spelling-book, was held valid. *Tainter v. Clark*, 5 Allen, 66. But it was held in a late case, *State v. Warren*, 28 Md. 338, that a bequest to the Methodist Episcopal Church at G., an organized denomination of Christians, who became incorporated after the death of the testatrix, was void, because there was no legatee capable of taking at the time the will became operative, and the legislature had no power to legalize the same. Bequests to the "Royal Society," the "Royal Geographical Society," and the "Royal Humane Society," were held to be for charitable uses. *Beaumont v. Oliveira*, Law Rep. 6 Eq. 534; s. c. L. R. 4 Ch. App. 309. And a

* 503 more * generally intended for them. Sir *John Leach*, Vice-Chancellor, in *Attorney-General v. The Earl of Lonsdale*,⁴³ says: "The institution of a school for the sons of gentlemen is not, in popular language, a charity; but in the view of the statute of Elizabeth, all schools for learning are so to be considered."

14. A bequest to build a monument for the testator is not charitable;⁴⁴ nor for repairing a vault containing his remains. But such a trust will be enforced against the heir.⁴⁵ And bequests for purposes of benevolence and general liberality, such as the trustee shall approve, cannot be supported either as general trusts

bequest of residue to A. and B. in trust for the different religious institutions before named in the will, or for "any other religious institutions or purposes as A. and B. might think proper," was upheld as a good charitable bequest. *Wilkinson v. Lindgren*, 17 W. R. 1000. This case was decided by Lord *Romilly*, M. R., on rehearing, his lordship having at first intimated an opinion that the bequest was void for uncertainty. And in the case of *Dolan v. Macdermot*, L. R. 3 Ch. App. 676, s. c. 17 W. R. 3, where the bequest was to trustees "to lay out in such charities and other public purposes as may lawfully be in the parish of T." as they in their discretion should think fit, it was held that the words amounted to a gift to such charities, in the technical sense used by the court, for the benefit of the parish, as the trustees should think fit, and that it was not void for uncertainty.

⁴³ 1 Simons, 105; *American Academy v. Harvard College*, 12 Gray, 582.

⁴⁴ *Mellick v. Asylum*, Jacob, 180; *Doe v. Pitcher*, 6 Taunt. 359. Gifts for the advancement of religion, or connected with religious services or places, are charitable, as bequests for the good, or reparation, or furniture, or ornaments of a parish church, or to a minister for preaching; and similar bequests have been held charitable. *Tudor's Ch. Trusts*, 10. But how far trusts for maintaining and keeping in repair the vault or tomb of the donor are to be regarded as charitable, the cases are not entirely clear. *Tudor's Ch. Trusts*, 11. It seems very singular that there should ever have arisen any question in regard to whether a trust to keep the donor's tomb in repair was a charitable use. There is nothing more intensely private and personal than such a bequest in regard to a private memorial of one after death. Sir *Thomas Plumer*, M. R., in *Mellick v. The President and Guardians of the Asylum*, Jac. Rep. 180, puts the question upon the true ground. The learned judge said: Charitable uses are "when the donor appropriates a gift, either to charity or to some public purpose, such as the repair of bridges, ports, and havens, &c., not operating in any manner to the benefit of himself. But the statute . . . does not apply to property expended like this by the party on himself, for the gratification of his own vanity on an object, which, instead of having any similitude to charity, is the very reverse of it. . . . It stands on the same footing as an expensive funeral."

⁴⁵ *Gravenor v. Hallum*, Amb. 643.

or for charitable uses.⁴⁶ Sir *William Grant*, M. R., here defines different trusts under a will, and the law applicable to them, with great clearness. 1. If property is given to one, with a mere * recommendation that he apply a portion of the income in * 504 a particular mode, intending to leave it optional with the donee, the gift is absolute. 2. If the donee is a mere trustee to carry into effect the purposes of the testator in regard to certain persons intended to be benefited, but not sufficiently identified in the will, the property is undisposed of, and courts of equity will not attempt to carry those purposes into effect by conjecture merely, but will regard the property as belonging to the heir or next of kin, as the case may be. But if the trust is in regard to a charitable use, courts of equity will carry the charitable intention into effect cy pres.

15. And bequests for purposes of general utility,⁴⁷ or to a chartered company to enable them to increase their stock of corn, which by law they were obliged to keep for the London market, are not regarded as charitable.⁴⁸ A devise to a corporation and other trustees, upon trust to distribute the rents and profits annually on a certain day, amongst certain families, according to their circumstances, as in the opinion of the trustees they might need such assistance, naming twenty-four persons, was held not void for uncertainty, but to create a beneficial interest in the persons who might lawfully take land by devise, and therefore not a charitable gift.⁴⁹

16. It has been decided that bequests "to be given in private charity" are not public charities, and cannot be administered by the courts of equity as such; and being void as trusts, on account

⁴⁶ *Morice v. Bishop of Durham*, 9 Vesey, 399; s. c. 10 Vesey, 521; s. p. *Chamberlain v. Stearns*, 111 Mass. 267.

⁴⁷ *Kendall v. Granger*, 5 Beav. 300.

⁴⁸ *Attorney-General v. Haberdashers' Company*, 1 My. & K. 420. Such a gift is for the benefit of the company; and, although it helps to enable them to do a charity which indirectly benefits the poor extensively, it is not a public charity. See *Thomson's Ex'rs v. Norris*, 5 C. E. Green, 489.

⁴⁹ *Liley v. Hey*, 1 Hare, 580. This gift was held not void, as tending to create a perpetuity. The learned judge here says, that, if the gift creates a present benefit to any person, the gift will be so far good; and, "where the will declares that objects are to take in succession, there is no reason why I should hold the will void as to those objects to whom an interest, not extending beyond their own lives, is given immediately at the testator's death."

of their indefiniteness, will go to the next of kin.⁵⁰ The Master of the Rolls here defines the distinction between public and private charities thus: "The charities recognized by this court are public in their nature: they are such as the court can see to the * 505 * execution of. . . . If a party is to execute the purpose of this testator, he cannot give to public charities: the disposition must be confined to private charity. . . . Assisting individuals in distress is private charity; but how can such a charity be executed by the court or by the crown? In all cases, the general principle is, that the trust must be of such a tangible nature as that the court can deal with it. When it is mixed up with general moral duty, it is not the subject of the jurisdiction of a court of justice. Private charity is in its nature indefinite. How can it be controlled? How can it be carried into execution?" But Lord *Langdale*, M. R., in *Kendall v. Granger*, *supra*, thought that a bequest "for the relief of domestic distress, and assisting indigent but deserving individuals," might be regarded as a good charitable bequest. But a bequest to be expended by executors, in concurrence with the trustees of Shakspeare's house in Stratford, in forming a museum at that house, is not a public charity.⁵¹ But a devise of land for a pest-house for plague patients was held a good charity, although the plague had not appeared in England for one hundred and eighty years.⁵²

17. A devise of land to a dissenting minister for life, and after his decease to trustees to be named by him during his life, for the use and support of the preaching of the word of God at the meeting-house for ever, with expressed expectation, that after the decease of the testator he would do all in his power to promote and carry on the work of God at such place, both in his lifetime and after

⁵⁰ *Ommanney v. Butcher*, Turn. & R. 260.

⁵¹ *Thomson v. Shakspeare*, 1 Johns. (Eng. Ch.) 612; s. c. 6 Jur. n. s. 118, 281.

⁵² *Attorney-General v. The Earl of Craven*, 21 Beav. 392; s. p. *Carne v. Long*, 4 Jur. n. s. 474; s. c. 6 id. 639. The following have been held not valid as charitable bequests: "For benevolent purposes," *James v. Allen*, 3 Mer. 17; "charitable or other purposes," *Ellis v. Selby*, 7 Sim. 352; s. c. 1 My & Cr. 286; "benevolent, religious, and charitable purposes," *Williams v. Kershaw*, cit. 1 Keen, 232; and 1 My. & Cr. 293, 298; "to buy such books as might have a tendency to promote the interests of virtue and religion and the happiness of mankind, and distributing such books," *Browne v. Yeall*, 7 Vesey, 50, n. (5), pp. 51, 52.

his decease, was held a good life-estate, although the limitation over might be bad.⁵³ But a devise to trustees, to be applied by them and their successors, and the officiating ministers of a Methodist congregation for the time being, as they should from time to time think fit, was held not a devise to charity.⁵⁴ * 506 A legacy to aid in the political restoration of the Jews to the city of Jerusalem was held to be illegal and void, as being in conflict with the neutral obligations of the English people and nation toward a nation at peace with them. But such a bequest for the purpose of establishing a bishopric of the English Church there, in concurrence with the permission of the Turkish government for that purpose, is valid.⁵⁵

18. In ordinary trusts, not coming within the scope of what the law denominates charitable uses, the objects must be so definite that the courts of equity can carry them into effect, or the estate will be treated as undisposed of, and go to the party entitled, if no such disposition had been attempted.⁵⁶ We have already had occasion to notice this subject in another place; but it may be stated here, that where an undistinguished portion of the estate is given to charitable uses, in conjunction with other trusts which fail for indefiniteness, the charitable uses will fail also, in consequence of their connection with the other trusts, and the impossibility of distinguishing what portion was designed for charity.⁵⁷ But where the trusts connected with charitable uses are sufficiently definite to be recognized in law, but the distribution of the fund among the objects named is left to trustees, who fail or decline to act, the courts will not allow the bequests to fail on that account, but will distribute the fund in equal proportions.⁵⁸

⁵³ *Doe d. Phillips v. Aldridge*, 4 T. R. 264.

⁵⁴ *Toone v. Copestake*, 6 East, 328. Lord *Ellenborough* said: "This is nothing like a devise to charitable uses. The trustees may apply the estate to any use they think fit. The will of the testator does not aim at confining them to apply it to charitable uses."

⁵⁵ *Habershon v. Vardon*, 7 Eng. L. & Eq. 228.

⁵⁶ 1 *Jarman* (ed. 1861), 195.

⁵⁷ 1 *Jarman*, 196.

⁵⁸ *Attorney-General v. Dooley*, 2 Eq. Cas. Ab. 194, pl. 15; s. c. 7 *Vesey*, 58, note; *Salisbury v. Denton*, 3 Kay & J. 529. And in *Adnam v. Cole*, 6 Beav. 353, where the testator bequeathed the residue of his personal estate to trustees, to expend the same in erecting such a monument to his memory as they saw fit, and in building an organ-gallery in the parish-church, and the

19. There seems to be a distinction in the cases, as to the * 507 form * of such bequests, and whether the trust to distribute the shares unequally is only contingent, and the gift absolute, unless the trustee otherwise directs, or the gift is made to depend upon the expressed will of the trustee. In the former case the devisees or legatees take equal shares, in case of the failure of the trustee to make any distribution ; but in the latter case there seems to be more question whether the bequest takes effect.⁵⁹

20. It seems in some of the cases to be supposed, where the testator has created a charitable use, if he has appointed trustees to exercise any discretion in regard to the matter, that the courts of equity will not interfere.⁶⁰

21. But it has been repeatedly held, that a devise or bequest to trustees, to apply the income for such charitable, public, or other purposes, as the trustees might think fit,⁶¹ even where the words were added, “ without being accountable to any person whomsoever

trustees applied the whole to the monument, it was held not a good execution of the trust, and was referred to the Master to report what apportionment was reasonable. The case of *Down v. Worrall*, 1 My. & K. 561, is sometimes regarded as at variance with the principle stated in the text; but if so, it has not been followed.

⁵⁹ The following cases are of the latter class: *Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61; *Brown v. Higgs*, 4 Vesey, 708; s. c. 5 Vesey, 495, 8 Vesey, 561; *Down v. Worrall*, 1 My. & K. 561. And *Harding v. Glyn*, 1 Atk. 469, seems to have gone upon similar grounds. In all such cases, the words of the will and the probable intent of the testator should have a controlling effect. See *Cole v. Wade*, 16 Vesey, 44.

⁶⁰ *Waldo v. Caley*, 16 Vesey, 206; *Horde v. Earl of Suffolk*, 2 My. & K. 59. But this rule, which seems a very proper one, has not met with favor from the American courts. It seems to be supposed that there can be no difficulty in the courts maintaining a public charity whose administration depends exclusively upon the discretion of the trustee. But when it is remembered that public charities are perpetual often, and that the discretion of trustees is limited to the life of such trustees, the difficulty of the trust being administered in equity after the decease of the trustee becomes apparent. The only mode of escaping this embarrassment seems to be for the trustee to declare a scheme at once. *Miller v. Teachout*, 24 Ohio, N. S. 525. Where the agencies intrusted with carrying the scheme of charity into effect are of a public character presumably permanent, there is less objection than if it were left to the discretion of a natural person. *Kinnaird v. Miller*, 25 Gratt. 107. But here the charity was regarded by the court as too indefinite to be upheld at common law, but good under the Virginia code.

⁶¹ *Ellis v. Selby*, 7 Sim. 352; *Vezey v. Jamson*, 1 Sim & Stu. 69.

for such disposition," although it did create a trust, it was not for a public charity, and was too indefinite to be carried into effect in any other view, and that the bequest must therefore fail, and fall into the residue of the estate.⁶² It seems to be now settled, therefore, that the courts of equity will only recognize the validity of such trusts as they can execute, or can control, when in the process of execution.⁶³ In *Ellis v. Selby*, Sir *Launcelot Shadwell*, Vice-Chancellor, said, "Here the testator has expressly drawn a distinction between charitable purposes and other purposes; and I must therefore take it that he meant either charitable purposes, or purposes not charitable: but whether the purposes not charitable were to be purposes which might give a beneficial interest to the trustees, or some other purposes, the testator has nowhere made clear. . . . It is nothing more than if he had given an estate to A. or to B." * And this decision was affirmed by * 508 Lord *Cottenham*.⁶² A similar decision had been before made by the same learned judge.⁶⁴

22. The policy of the early cases in the English courts, and of the early English statutes, seems to have been to favor gifts, even of land, to charitable purposes.⁶⁵ And from this policy springs the rule, no doubt, that property once devoted to public charity,

⁶² *Ellis v. Selby* (on appeal before the Lord Chancellor), 1 My. & Cr. 286.

⁶³ *Nash v. Morley*, 5 Beav. 182.

⁶⁴ *Williams v. Kershaw*, 5 L. J. n. s. 84; s. c. 5 Cl. & Fin. 111. To render the gift one to charitable uses, it seems to be required that it should be obligatory upon the trustee that he should apply the whole in charity, and that it is not enough that he may do so. *Kendall v. Granger*, 5 Beav. 300. See *James v. Allen*, 3 Mer. 17. In this country, some of the most indefinite trusts, and such as did not come within the definition of charitable uses, have nevertheless been carried into effect. *Drew v. Wakefield*, 54 Me. 291. And in a still later case, the Trusts of Dwinel's Will, the same court upheld trusts of so indefinite a character, that an English equity court would not have called upon counsel for argument against them, regarding their invalidity as self-evident. But many of the American courts seem to regard all bequests to charity, whether public or private, as necessarily to be upheld, without regard to the impracticability of administering them under the will, even under the rule *cy pres*. There is, perhaps, no subject where the American courts have departed so widely from the rules of the English chancery law as in regard to charitable trusts. It has become almost a matter of conjecture, which will or will not be upheld as a good charity in the American courts.

⁶⁵ *Flood's Case*, Hob. 136; *Attorney-General v. Rye*, 2 Vern. 453; *Same v. Burdet*, id. 755; *Rivet's Case*, Moore, 890, 3 Ch. Rep. 220; *Collison's Case*, Hob. 136; *The Statute of Charitable Uses*, 43 Elizabeth, c. 4.

although in a form not susceptible of legal accomplishment, shall not be allowed to revert into the mass of the estate of the donor, but the courts of equity will apply it to similar objects of charity to those designated, so far as the law will allow.

23. But in the beginning of the eighteenth century, from the tendency which had manifested itself to lock up property in the hands of trustees for charitable uses, it was thought expedient to enact the statute of 9 Geo. II. c. 36, commonly known as the statute of mortmain, by which it is provided that all gifts of hereditaments, or personal estate to be laid out in the purchase of hereditaments, and all incumbrances of such hereditaments for the benefit of any charitable use whatsoever, all gifts of stock in the public funds for any such use, shall be absolutely void, unless such hereditaments shall be conveyed, by deed executed with certain prescribed formalities, one year before the decease of the donor, and unless such stocks shall be transferred six calendar months before the decease of the donor. Such deed to be enrolled in chancery within six calendar months after its execution; and all such conveyances to be made to take effect in possession, for such charitable use, immediately upon their execution, and to be without any power of revocation, reservation, or trust, &c., for the benefit of the donor, or any person claiming under him.⁶⁶

24. The early inclination of the courts was to regard all * 509 kinds * of property which had any possible connection, either in origin or existence, with the realty, as coming within the definition of hereditaments. Hence canal shares were so held.⁶⁷ And the same is true of all shares in joint-stock com-

⁶⁶ But this will not preclude the donor reserving to himself a power of regulating the charity. *Grieves v. Case*, 2 Cox, 301; *Attorney-General v. Munby*, 1 Mer. 327. See *Sinnett v. Herbert*, L. R. 7 Ch. App. 232, post, n. 186.

⁶⁷ *Tomlinson v. Tomlinson*, 9 Beav. 459. But the tendency of recent decisions is in the opposite direction. *Baxter v. Brown*, 7 Man. & Gr. 198; *Boyce v. Greene*, Batty, 608. Lord *Cranworth*, in *Edwards v. Hall*, 6 DeG., M. & G. 74, 92; Lord *Truro*, in *Myers v. Perigal*, 2 DeG., M. & G. 599; Lord *St. Leonards*, in same case. The shares in all joint-stock companies, although their profits arise solely from holding lands, are exempt from the act. *Sparling v. Parker*, 9 Beav. 450; *Walker v. Milne*, 11 Beav. 507; *Thompson v. Thompson*, 1 Coll. C. C. 381; *Hilton v. Giraud*, 1 DeG. & S. 183; *Myers v. Perigal*, 16 Sim. 533; *Edwards v. Hall*, 11 Hare, 1; 6 DeG., M. & G. 74, overruling *Ware v. Cumberlege*, 20 Beav. 503; *Linley v. Taylor*, 1 Gif. 67.

panies, the holders of which have no interest in any realty belonging to the company, but only the right to share in the profits.⁶⁸

25. And although it has sometimes been contended, and been declared by high authority,⁶⁹ that where the object and purpose of an association was to deal in lands, and to derive profits from the use of land, the shares were so far of the realty, that they could not be devised to charities; and a distinction has thus been attempted to be maintained between this class of cases and those companies where land was used as a mere incident to the transaction of other business.⁶⁹ The distinction has not been regarded as having any foundation in principle.⁷⁰ But if land is vested in any * one, not for the purposes of the business of the * 510 company, but for the individual shareholders, in proportion to their shares, then the shares will constitute an interest in land within the statutes of mortmain.⁷¹

26. Railway debentures, which are securities resting upon the pledge of the undertaking and the tolls, are not within the act, unless they amount to an assignment of the undertaking.⁷² We

⁶⁸ *Tippets v. Walker*, 4 Mass. 595.

⁶⁹ *Morris v. Glynn*, 27 Beav. 218.

⁷⁰ 1 Jarman, 204, 205. See also *Broughton v. Hutt*, 3 DeG. & J. 501; s. c. 5 Jur. n. s. 231. This is the case of shares in the Western Australian Land Company, formed for the purchase and the cultivation of lands; and the lords-justices, as well as the learned counsel in the case, make no question the shares are personal estate. The English courts hold, where the devise does not absolutely require the amount or any portion of it to be invested in real estate, so that the trustees have a discretion to apply it to the purpose indicated in some other mode, that it is not avoided by the statute of mortmain. *Hopkins v. Phillips*, 3 Gif. 182; *Graham v. Paternoster*, 8 Jur. n. s. 127; s. c. 31 Beav. 30; *Deut v. Allcroft*, id. 112; s. c. 30 Beav. 335. And a legacy for the enlargement of a church has been held valid, as it does not necessarily involve the bringing of fresh land into the market. *Hawkins in re*, 10 Jur. n. s. 922. But a devise for the prevention of cruelty to animals, by the application of the avails for the establishment of slaughter-houses, &c., is a void use, as coming within the statute of mortmain. *Tatham v. Drummond*, 10 Jur. n. s. 1087. It is here said, the court should adopt such a construction as will reach the intention of the testator, without reference to the statute; and if that brings the case within the statute, no secondary meaning can be applied to take the case out of the statute, which seems to us a most salutary rule of construction in all cases.

⁷¹ Vice-Chancellor *Wood*, in *Hayter v. Tucker*, 4 Kay & J. 251.

⁷² *Bunting v. Marriott*, 19 Beav. 163. See also *Toppin v. Lomas*, 16 C. B. 145, 159; *Howse v. Chapman*, 4 Vesey, 542; *Myers v. Perigal*, 16 Sim. 533;

will not go here minutely into the cases in regard to the kinds of property which have been held by the English courts to come within the statutes of mortmain, as those statutes have not been re-enacted in the American states to any great extent; and where a limitation is put upon testamentary capacity in regard to charitable bequests, it has more commonly only extended to limit the period before death of executing the testamentary act, and has made no distinction between real and personal estate.

27. Where lands are devised to a charity, the trust is not only void, but the legal estate does not vest, and the heir may recover at law in such cases.⁷³

28. And where money is devised to build a school or almshouses, or for any other purpose, within the prohibition of the statutes of mortmain, and the principal devise is void, this will avoid all bequests for the repair of such buildings, or for the support of the institutions therewith connected.⁷⁴ But if the primary gift is valid, and is only followed by a void one, merely ancillary to it, the legality of the primary gift is not affected by its
 * 511 illegal * ancillary.⁷⁵ But in some cases a devise has been held to fail from its connection with some impracticable scheme.⁷⁶

Ashton v. Lord Langdale, 4 DeG. & S. 402; *Langham's Trust*, 10 Hare, 446; *Walker v. Milne*, 11 Beav. 507.

⁷³ *Adlington v. Cann*, 3 Atk. 141, 155; *Burdett v. Wrighte*, 2 B. & Ald. 710; *Pilkington v. Boughiey*, 12 Sim. 114; *Cramp v. Playfoot*, 4 Kay & J. 479; *Chester v. Chester*, L. R. 12 Eq. 444. If there is a valid trust joined with the void one, the legal estate will vest, and the heir or residuary devisee must resort to equity. *Willet v. Sandford*, 1 Ves. Sen. 186; 1 Jarman, 207.

⁷⁴ *Attorney-General v. Goulding*, 2 Br. C. C. 428; *Same v. Whitchurch*, 3 Vesey, 141; *Limbrey v. Gurr*, Madd. & Geld. 151; *Smith v. Oliver*, 11 Beav. 481; *Attorney-General v. Hodgson*, 15 Sim. 146; *Attorney-General v. Hinxman*, 2 J. & W. 270.

⁷⁵ *Blandford v. Fackerell*, 4 Br. C. C. 394; s. c. 2 Ves. Jr. 238; *Attorney-General v. Stepney*, 10 Vesey, 22.

⁷⁶ *Grieves v. Case*, 4 Br. C. C. 67. See *Levy v. Levy*, 33 N. Y. 97, where the whole charitable scheme of the will proceeded upon the assumption that the devise of a farm in another state was valid, but which was in fact void by the laws of the state where situated, and it was held to avoid the whole. But where the bequest was for keeping the tomb of the testatrix's mother in repair, and for placing an ornamental window in the church in memory of her mother, and for ornamenting the chancel of the church, the court held the two latter objects good charitable uses, and that the first was void, and distributed the fund equally among all the objects, allowing that which failed

29. Equity will not execute such an illegal trust, even where the legacy has been paid.⁷⁷ But where lands have been long held and applied to charity, under a devise, it will be presumed against the heir that all proper means have been taken to dedicate the property effectually to charity.⁷⁸

30. All secret trusts with the devisee whereby it is recommended or understood or expected that lands or other hereditaments will be applied for public charities, in perpetuity, will have the same effect in avoiding the devise as if declared in the will.⁷⁹ So also, if there be any secret understanding that the grantor shall enjoy during his life the income of the estate conveyed by him to charitable purposes in conformity with the other requirements of the statutes of mortmain, it will invalidate the conveyance.⁸⁰ But where land is devised, and by a subsequent unattested paper, or by parol, the testator declares a trust for charity, it will not defeat the devise.⁸¹ But the case would be different if the devisee had connived at the declaration of trust as valid, or given any * assurance that he would carry the same into effect.⁸² And * 512 even such a connivance by one of several devisees, acted upon by the testator, will avoid the entire devise.⁸³

31. But in the case just cited, where the testator devised land to four persons as tenants in common, and, after executing his will, communicated to one of the devisees his desire that the property should be held on charitable trusts, who received the communication in silence, and no communication whatever was made to the other devisees, it was held by Vice-Chancellor *Wood*, that the

of a legal object to go to the next of kin. *Hoare v. Osborne*, Law Rep. 1 Eq. 585.

⁷⁷ *Attorney-General v. Ackland*, 1 Russ. & My. 243.

⁷⁸ *Attorney-General v. Moor*, 20 Beav. 119.

⁷⁹ *Boson v. Statham*, 1 Eden, 508; *Muckleston v. Brown*, 6 Vesey, 52; *Stickland v. Aldridge*, 9 Vesey, 516; *Paine v. Hall*, 18 Vesey, 475. And such trust, if denied by the devisee, may be proved aliunde. *Edwards v. Pike*, cited in 1 Cox, 17; s. c. 1 Eden, 267. See *Springett v. Jennings*, L. R. 10 Eq. 488.

⁸⁰ 1 Jarman, 212; *Fisher v. Brierley*, 6 Jur. n. s. 159, 615, 30 Beav. 268, where the point is conceded, but the proof failed. See also *Alexander v. Brame*, 7 DeG., M. & G. 525.

⁸¹ *Adlington v. Cann*, 3 Atk. 141; s. c. cited in 9 Vesey, 519; *Wallgrave v. Tebbs*, 2 Kay & J. 313; *Lomax v. Ripley*, 3 Sm. & Gif. 48.

⁸² *Adlington v. Cann*, supra; *Russell v. Jackson*, 10 Hare, 204.

⁸³ *Tee v. Ferris*, 2 Kay & J. 357.

devisee, with whom the testator had communication, must be regarded as assenting to the request of the testator, and thus defeated the devise as to himself; but that as to the others, the devise should take effect beneficially.

32. Where the bequest combines different kinds of property, some of which may be given to charity and some not, and the uses are partly charitable and partly not, equity will not so marshal the assets in favor of the charitable uses that the other trusts may be met by property not applicable to charity, and thus leave the property which is legally applicable to that purpose to be so applied.⁸⁴

33. But where the testator left all his estate, real and personal, to trustees, upon trust to sell and pay his debts and legacies, and apply the residue for charitable purposes, it was decided⁸⁵ not to pay the debts and legacies exclusively out of the personal estate, but to apply both real and personal estate, ratably, to that purpose, and thus leave the charitable uses to share their just proportion of the real estate. And even where the bequests to charity are merely pecuniary, but the residue, both real and personal, is
* 513 thus * bequeathed, the courts of equity have required the debts and legacies to be paid ratably out of real and personal estate, thus avoiding a ratable amount of the legacies to charity.⁸⁶

⁸⁴ *Mogg v. Hodges*, 2 Ves. Sen. 52; *Attorney-General v. Tyndall*, 2 Eden, 207; s. c. Amb. 614; *Waller v. Childs*, Amb. 524; *Foster v. Blagden*, Amb. 704; *Middleton v. Spicer*, 1 Br. C. C. 201; *Attorney-General v. Earl of Winchelsea*, 3 Br. C. C. 373; *Makeham v. Hooper*, 4 Br. C. C. 153; *Hobson v. Blackburn*, 1 Keen, 273; *Williams v. Kershaw*, 5 L. J. Ch. N. s. 84; s. c. 5 Cl. & Fin. 111. But see *Attorney-General v. Caldwell*, Amb. 635. But in *Wigg v. Nicholl*, L. R. 14 Eq. 92, where the will contained bequests to six hospitals, three of which had obtained dispensation against the statutes of mortmain and three had not, it was held the estate should be so distributed that the impure personalty should go, as far as practicable, to the three first-named hospitals. A direction in the will to marshal the assets in favor of charitable bequests respected. *Miles v. Harrison*, L. R. 9 Ch. 316.

⁸⁵ *Howse v. Chapman*, 4 Vesey, 542; *Paice v. Archbishop of Canterbury*, 14 Vesey, 364; *Curtis v. Hutton*, id. 537; *Currie v. Pye*, 17 Vesey, 462; *Crosbie v. Mayor of Liverpool*, 1 R. & My. 761, n.; *Fourdrin v. Gowdey*, 3 My. & K. 383, 397; *Johnson v. Woods*, 2 Beav. 409; *Attorney-General v. Southgate*, 12 Sim. 77; *Edwards v. Hall*, 11 Hare, 1, 22.

⁸⁶ *Philanthropic Society v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462; *Cherry v. Mott*, 1 My. & Cr. 123; *Briggs v. Chamberlain*, 18 Jur. 56. In

34. The testator may direct a charitable legacy paid out of pure personalty; and in such case, if the personal estate be exhausted by specialty creditors, the charity may stand in the place of such creditors.⁸⁷ And in general, where the testator directs a legacy for charity to be paid out of pure personalty, all that remains of such property after paying debts and legacies, either according to the legal priority of such claims or the express direction of the testator, must be applied towards the charitable legacy,⁸⁸ notwithstanding some decisions which seem to have been designed to defeat the legacy to charity, as far as that was practicable.⁸⁹ But the debts and funeral and testamentary expenses will be paid ratably out of all the property applicable to those objects, unless the will contain an express direction to the contrary, which seems the only effectual mode of securing the payment of a legacy for charitable uses in the English courts.⁹⁰ The English courts have done all in their power to defeat legacies for charitable uses, where they could be brought, by any fair construction, within the statutes of mortmain.⁹¹ The courts of equity have in this respect even declined to adopt the same favorable construction towards charities which they have towards aliens,⁹² and allow them to hold money

Robinson v. London Hospital, 10 Hare, 19, Vice-Chancellor *Wood* held the proportion of value in such cases is to be fixed as of the date of the apportionment, and not of that of the death of the testator.

⁸⁷ *Attorney-General v. Lord Mountmorris*, 1 Dick. 379.

⁸⁸ *Robinson v. Geldard*, 3 Mac. & Gor. 735, reversing the decision in s. c. 3 DeG. & Sm. 499.

⁸⁹ *Philanthropic Society v. Kemp*, 4 Beav. 581; *Sturge v. Dimsdale*, 6 Beav. 462.

⁹⁰ *Tempest v. Tempest*, 7 DeG., M. & G. 470.

⁹¹ 1 *Jarman*, 218; *Leacroft v. Maynard*, 1 Ves. Jr. 279; *Wilson v. Thomas*, 3 My. & K. 579. In the last case the court did give the effect to the word "personalty," which is ordinarily expressed by "pure personalty," that being the obvious sense in which it was used by the testator.

⁹² *Du Hourmelin v. Sheldon*, 1 Beav. 79; s. c. 4 My. & Cr. 525. See also *Fourdrin v. Gowdey*, 3 My. & K. 383; *Master v. De Croismar*, 11 Beav. 184. In the very recent case of *Brook v. Badley*, Law Rep. 3 Ch. App. 672, it was held that a legacy payable partly out of personalty, and partly out of the proceeds of the sale of realty, was, while unpaid, within the statutes of mortmain, and could not be bequeathed by the legatee to a charity; nor will the court apportion it so as to give the charity that portion of it which would have been paid out of personalty. But the avails of an estate, sold under the order of the court, may be applied to the payment of a bequest to charity. *Beaumont v. Oliveira*, Law Rep. 6 Eq. 534; s. c. Law Rep. 4 Ch. App. 309.

bequeathed, where it is directed to be raised out of the sale of real estate.⁹³

* 514 * 35. There is a note⁹⁴ to Mr. Jarman's chapter upon the English statute of mortmain, which shows most conclusively, in our judgment, that the spirit of this statute is conceived in an over-cautious feeling of circumspection in regard to the interests of society, and the mode in which they are liable to be unfavorably affected by devises of lands or real chattel interests to charitable uses; and that every security in regard to that liability might be effected by providing for the sale of such real estate, and compelling the charities to accept the avails in money; and that in this mode much litigation would be avoided, and the apparent effort to evade and defeat the charitable intention of testators would also be saved, and many other advantages gained not a little creditable to the country, and far more in accordance with the spirit of the age than the English statutes of mortmain or the decisions of the equity courts in regard to them.⁹⁵

36. The statute of mortmain does not extend to Scotland,⁹⁶ or Ireland,⁹⁷ or the Colonies.⁹⁸ It is purely English in its character and force. The British parliament has often passed statutes in favor of particular charities, and the statute of mortmain * 515 has been * repealed pro tanto in favor of the British Museum, the Bath Infirmary, Greenwich Hospital, the Foundling and St. George's Hospitals, the Royal Naval Asylum, the Seaman's Hospital Society, and some other public institutions.⁹⁹

⁹³ 1 Jarman, 218, 219.

⁹⁴ 1 Jarman, 219, note (y).

⁹⁵ A careful observation in regard to the interests in America, which represent the opposition to charitable bequests, will convince us, probably, that it comes neither from the most laborious nor the most successful of business efforts and enterprises, nor from those who have most at heart either the religious state, the morals, or the material comforts, of any class, and especially the poorer classes.

⁹⁶ *Oliphant v. Hendrie*, 1 Br. C. C. 571; *Curtis v. Hutton*, 14 Vesey, 537; *Mackintosh v. Townsend*, 16 Vesey, 330; *Attorney-General v. Mill*, 3 Russ. 328; s. c. 5 Bligh, n. s. 593; s. c. 2 D. & Cl. 393.

⁹⁷ *Campbell v. Earl of Radnor*, 1 Br. C. C. 271; *Baker v. Sutton*, 1 Keen, 224; *Attorney-General v. Power*, 1 Ball & B. 154.

⁹⁸ *Sir William Grant*, M. R., in *Attorney-General v. Stewart*, 2 Mer. 143; *Whicker v. Hume*, 1 DeG., M. & G. 506; s. c. 14 Beav. 509; s. c. 7 Ho. Lds. Cas. 124.

⁹⁹ 1 Jarman, 222.

37. And it will be remembered that the English statute of mortmain leaves the entire personal estate of the testator liable to the unrestricted disposition of his will for charity, unless he direct it to be invested in real estate,¹⁰⁰ and this notwithstanding

¹⁰⁰ 2 Freem. Ch. Cas. in note, Hovend. ed. 330; *Baylis v. Attorney-General*, 2 Atk. 239; *Da Costa v. De Pas*, Amb. 228. But a direction to invest the bequest in the public funds, until it can be laid out in the purchase of lands to the satisfaction of the trustees, will not bring it within the statutes of mortmain. *Gimmett v. Gimmett*, Amb. 210. And bequests for building a parsonage are not within the statute. *Glubb v. The Attorney-General*, Ambler, 373. But a recommendation to invest a bequest in lands vitiated the charity. *Kirkbank v. Hudson*, 7 Price, 221. Where the trustees have a discretion whether to invest the fund in land or otherwise, the bequest will not be avoided under the statute of mortmain. *Soresby v. Hollins*, Amb. 211. But where there is a request to have the fund invested in land, it will commonly be held void under the statute, unless it can fairly be construed as resting in the discretion of the trustees. *Mather v. Scott*, 2 Keen, 172; *Cawood v. Thompson*, 1 Sm. & G. 409. To be invested in some "real security," held void. *Attorney-General v. Bowles*, 2 Ves. Sen. 547. So money due a mortgagee is within the statute. *Same v. Meyrick*, id. 44; *Waterhouse v. Holmes*, 2 Sim. 162. So of a judgment debt to be paid out of testator's realty. *Collinson v. Pater*, 2 Russ. & My. 344. But a bequest to defray the costs of building a church, valid. *Dixon v. Butler*, 3 Yo. & Coll. Ex. 677. But a bequest for building almshouses on land, procured by the devisees from other parties, was held void. *Giblett v. Hobson*, 5 Sim. 651. See also *Watmough's Trusts*, 17 W. R. 959, L. R. 8 Eq. 272, where it was held that a charitable legacy, to be applied in building, is void under the statutes of mortmain, unless the testator indicate by his will an intention that no part of the money shall be applied in the purchase of a site for the building. Extrinsic evidence cannot be resorted to for the purpose of showing that the testator in fact expected the buildings to be built upon land otherwise obtained. That must appear by the will. *Attorney-General v. Davies*, 9 Ves. 535; s. p. *Hawkins v. Allen*, L. R. 10 Eq. 246. But see *Lewis v. Allenby*, L. R. 10 Eq. 668; *Pratt v. Harvey*, 12 id. 544; *Booth v. Carter*, L. R. 3 Eq. 757, not followed.

Where a bequest was for paying an apprentice fee annually for a boy, to be selected from one or more of certain parishes named, and, in default of the sum being claimed, for the benefit of a hospital, and it not being claimed, and the arrears having accumulated for many years, it was held that the hospital was not entitled to the arrears, but that they ought first to be applied according to a scheme for the benefit of the parishes specified, and in accordance with the provisions of the will. *In re Parish of Upton Warren*, 1 My. & K. 410. See also *In re Lambeth's Charities*, 21 Eng. L. & Eq. 427. The legislature cannot direct a devise of land converted into personalty in order to save the failure of the devise as tending to create a perpetuity, although the act will render the fund more effectual to carry out the intentions of the testator. *Tharp v. Fleming*, 1 Houst. 580. A bequest to support schools and the poor of the county

* 516 * such charitable institutions are made of perpetual duration.

And this class of dispositions is highly favored in point of construction.¹⁰¹

38. Thus it has happened, that bequests of personalty, of the loosest and most indefinite character, have been upheld by the courts, and applied to analogous objects, or such as the courts felt justified in presuming the testator might have had in his mind. For instance, a gift to the poor in general;¹⁰² or to charitable uses

is a good charitable use. *Heuser v. Harris*, 42 Ill. 425. And bequests for "the preparation and circulation of books to create a public sentiment that will put an end to negro slavery in this country, or for the benefit of fugitive slaves who may escape from the slaveholding states of this infamous Union from time to time," were held valid charities, notwithstanding the testator expressed a desire that the trustees of the funds might become a permanent organization, and receive the services and donations, &c., of the "friends of the slave." And, as slavery had been abolished since the death of the testator, the court held that the funds must be administered *cy pres*, in the furtherance of objects next or nearest to those indicated. *Jackson v. Phillips*, 14 Allen, 539. In this case a bequest "to secure the passage of laws granting women the right to vote, to hold office, and to hold, manage, and devise property, and all other civil rights enjoyed by men," was held not to create a valid charitable use. The opinion of the court in this case, by Mr. Justice *Gray*, occupies nearly fifty pages, and exhibits great learning and research, as well as ability, and upon all the points, and especially the rights and duty of the highest court of equitable jurisdiction in the state to administer charities upon the principles of the doctrine of *cy pres*, is one that will repay the most careful study of the profession; and we are happy to be able to say it is characterized by a creditable degree of firmness and zeal in favor of carrying into effect the purpose of bequests for charitable uses, which, as we have stated elsewhere, is not always the case in some of the American states. In a recent Irish case, *In re St. John's Church, Cork*, I. R. 3 Eq. 335, the court directed the trustees of a charity, for the support of daily choral services in the cathedral, to apply a portion of the fund for the purchase of a new organ, in regard to which there would not seem much ground of question, or much occasion for resort to the doctrine of *cy pres*, although indexed under that head. See *Gooch v. Association, &c.*, 109 Mass. 558, where the right of charitable associations to enforce their rules against the inmates is discussed.

¹⁰¹ *Cary v. Abbot*, 7 Vesey, 490.

¹⁰² *Attorney-General v. Matthews*, 2 Lev. 167; *Attorney-General v. Clarke*, Amb. 422. But a bequest for the use of a benevolent society, if any such existed, to alleviate the sufferings of the most prudent poor, but not the intemperate, by procuring food, clothing, and other necessities for winter, was held not proper to be given to a temperance society, although one of its objects was to distribute funds to the suffering poor who did not use intoxicating liquors as a beverage. *Grandom's Estate*, 6 W. & S. 537.

generally; ¹⁰³ or for the advancement of religion, to be laid out "in the service of our Lord and Master, and I trust * Redeemer;" ¹⁰⁴ or for such charitable uses as the testator's * 517 executor shall appoint, and the testator revokes the power of the executor; ¹⁰⁵ or the executor renounces probate, so that he cannot exercise the discretion; ¹⁰⁶ or to such charitable uses as A. B. shall appoint, and he dies before the testator; ¹⁰⁷ or neglects or refuses to appoint; ¹⁰⁸ or to such charitable uses as the testator has or shall appoint, and he dies without making any appointment; ¹⁰⁹ or the instrument of appointment cannot be found; ¹¹⁰ or where the testator makes a disposition in favor of an object which has no existence; ¹¹¹ or which is void in law; ¹¹² or which has become impossible; ¹¹³ or bequeaths to trustees of a charity who refuse to accept; ¹¹⁴ or to a particular charity, by a description which is equally applicable to more than one, and it is wholly uncertain which was intended; ¹¹⁵ or where the testator evinces the intent to give in charity, but leaves blanks in his will for the names of the charities, and the proportion to be allotted to each. ¹¹⁶

39. In all these cases, bequests upon any other subject than

¹⁰³ *Clifford v. Francis*, Freem. Ch. Cas. 330; *Attorney-General v. Herrick*, Amb. 712.

¹⁰⁴ *Powerscourt v. Powerscourt*, 1 Moll. 616.

¹⁰⁵ *White v. White*, 1 Br. C. C. 12.

¹⁰⁶ *Attorney-General v. Fletcher*, 5 Law J. N. S. Ch. 75.

¹⁰⁷ *Moggridge v. Thackwell*, 1 Ves. Jr. 464; *Mills v. Farmer*, 1 Mer. 55.

¹⁰⁸ *Attorney-General v. Boulton*, 2 Ves. Jr. 380; s. c. 3 Vesey, 220.

¹⁰⁹ 2 Freem. Ch. Cas. in note, Hovend. ed. 330; *Mills v. Farmer*, 1 Mer. 55; *Comm. v. Sullivan*, 1 D. & War. 501.

¹¹⁰ *Attorney-General v. Syderfen*, 1 Vern. 224; s. c. cited 7 Vesey, 43, n.

¹¹¹ *Attorney-General v. City of London*, 3 Br. C. C. 171; s. c. 1 Ves. Jr. 243; *Loscombe v. Wintringham*, 13 Beav. 87; *Attorney-General v. Oglander*, 3 Br. C. C. 166.

¹¹² *Attorney-General v. Whorwood*, 1 Ves. Sen. 534; *Same v. Vint*, 3 DeG. & S. 704.

¹¹³ *Attorney-General v. Guise*, 2 Vern. 266; *Attorney-General v. Glyn*, 12 Sim. 84.

¹¹⁴ *Attorney-General v. Andrew*, 3 Vesey, 633; *Denyer v. Druce*, Taml. 32; *Reeve v. Attorney-General*, 3 Hare, 191.

¹¹⁵ *Simon v. Barber*, 5 Russ. 112; *Bennett v. Hayter*, 2 Beav. 81; *Kilvert's Trusts*, L. R. 12 Eq. 183; *Alchin's Trust*, L. R. 14 Eq. 230.

¹¹⁶ *Pieschel v. Paris*, 2 Sim. & Stu. 384. But this cannot be done if the whole sum be left blank. *Hartshorne v. Nicholson*, 26 Beav. 58.

charity would have been declared void for such uncertainty ; but where the testator's intent is clear, it must be followed.¹¹⁷

40. But if it appear that the testator had a particular * 518 object * of charity in mind, and not a general purpose of charity, and the particular object fail, the bequest will not be administered cy pres, but will fail altogether.¹¹⁸

41. The distinction in England between the class of cases administered in the Court of Chancery by its ordinary chancery powers, and that where the administration is referred by the king, as *parens patriæ*, to the Chancellor, by virtue of the sign-manual, is not important in this country, since both classes of cases are here administered by the courts of chancery under their ordinary jurisdiction wherever a jurisdiction for the administration of charitable bequests has been created in equity, either by express statute, or by adoption of the principles of the statute of Elizabeth.

42. This distinction in the English courts was made to rest upon the fact, whether the donor had provided trustees or not. In the former case, the execution of the trust came within the ordinary jurisdiction of courts of equity ; but in the latter it was regarded as a gift to charity generally ; and there being no trustee, the execution of the charitable intent of the testator was held to devolve upon the sovereign as a personal trust, and was of necessity committed to the Chancellor, as the legitimate representative of the sovereign in the discharge of these personal offices.¹¹⁹

¹¹⁷ *Attorney-General v. Whiteley*, 11 Vesey, 241. See *Chamberlayne v. Brockett*, L. R. 8 Ch. App. 206 ; post, n. 134.

¹¹⁸ *Attorney-General v. Bishop of Oxford*, 1 Br. C. C. 444, n. ; *Cherry v. Mott*, 1 My. & Cr. 123 ; *Clark v. Taylor*, 1 Drew. 642 ; *Russell v. Kellett*, 3 Sm. & Gif. 264 ; *Marsh v. Means*, 3 Jur. n. s. 790. See also *Sinnett v. Herbert*, L. R. 12 Eq. 201.

¹¹⁹ *Moggridge v. Thackwell*, 7 Ves. 36, 68 ; *Paice v. The Archbishop of Canterbury*, 14 Ves. 364, 372. And in *Attorney-General v. Gladstone*, 13 Sim. 7, the devise was of £15,000 to a person by name, "to be applied for the use of Roman Catholic priests in and near London, at his absolute discretion," and the trustee named died before the testator: it was held that the legacy did not thereby lapse, but was a good gift to charity, and was intended to be a permanent one, for the benefit, not of such Roman Catholic priests as were in and about London at the decease of the testator, but such and their successors then, for all future time, and as long as Roman Catholic priests should be found in and near London, which the Vice-Chancellor very naturally concluded would be "as long as the world endures." A scheme was ordered accordingly. See also *Reeve v. The Attorney-General*, 3 Hare, 191.

43. And in cases where the bequest is to particular institutions of charity, to be expended in a prescribed mode, and such institutions disclaim the trust, it has been held that the Court of * Chancery, under its ordinary jurisdiction, would adminis- * 519 ter the charity for the accomplishment of the same objects named by the testator, as far as that was practicable, by means of a scheme to be settled by the Master under the direction of the court.¹²⁰ The Vice-Chancellor said: "In this case the objects of the trusts are pointed out by the will with great minuteness. I have no ground, either in the language of the will, or the circumstances of the case, for supposing that the discretion of the particular societies named in the will was of the essence of the gifts." It was therefore referred to the Master to settle a scheme for the distribution of the legacies, "having regard to the terms of the charitable bequests."¹²⁰

44. Where a fund is given to a society or corporation for a charitable purpose, even where it is much larger than the testator

¹²⁰ *Reeve v. Attorney-General*, 3 Hare, 191. And where the corporation or society named in the will to administer the charity is dissolved, or otherwise fails, the Court of Chancery will appoint a new trustee, or in other ways carry the charitable intent into effect. *Denyer v. Druce*, Taml. 32; *Hayter v. Trego*, 5 Russ. 113. There is one American case, *American Bible Society v. Marshall*, 15 Ohio, N. S. 537, where the decision seems to go upon the ground that the devise of land to a corporation in another state, for charitable or religious purposes, may be upheld, when it could not be so upheld by the courts of the state where the corporation has its charter and operation, if made in that state. This is placed by the court upon the plausible ground, that a statute of the state, where the corporation exists, restricting the operation of devises of real estate to corporations, must be limited in its operation to such devises of land as are made within the state, and of lands within the state. But it seems questionable whether the capacity of the corporation to take lands by devise is not to be measured exclusively by the law of the state where the corporation exists, which is the law of the corporation for all purposes. We should regard the case as decided upon such peculiar grounds as not to be of much general authority. But an English devise to the President and Vice-President of the United States and the Governor of Pennsylvania, in trust for establishing a college in that state, to have professors on moral philosophy, and one to vindicate and advocate the rights of the blacks to an equality of civil rights with the whites, and which the trustees declined to accept, was held to have failed; and, the court having no power to enforce the trust through other trustees, the funds were deemed to have fallen into the residue of the estate. *New v. Bonaker*, Law Rep. 4 Eq. 654. See also *Kilvert's Trusts*, L. R. 12 Eq. 183.

intended the society should administer, it will nevertheless, on the ground of the confidence reposed, be transferred to them, without the settlement of a scheme.¹²¹

* 520 * 45. So also a bequest given to A. B. "to be applied to the use of" a certain Catholic college, and A. B. died in the lifetime of the testator, the court, on being satisfied of the respectability and permanent character of the institution, ordered the legacy to be paid to the president of the college, he being the officer intrusted with the management of its pecuniary affairs, without requiring any scheme to be settled, although the Attorney-General asked for one.¹²²

46. The Attorney-General is a necessary party to all suits¹²³ for the administration of charitable funds, except where a legacy is given to the officers of an established institution as part of its general funds.

47. Bequests to a foreign charity will be ordered to be paid over, to be administered in the foreign forum, as the court do not administer the funds of a foreign charity.¹²⁴ But under

¹²¹ *Society for the Propagation of Gospel in Foreign Parts v. The Attorney-General*, 3 Russ. 142.

¹²² *Walsh v. Gladstone*, 1 Phill. C. C. 290.

¹²³ *Wellbeloved v. Jones*, 1 Sim. & Stu. 40. This was a bequest of £5,000 to certain officers of a theological college for the education of dissenting ministers, the interest of such sum to be applied by such officers, with any others they might choose to associate with them, as a board of trust, to increase the salaries of such conscientious dissenting ministers as stand most in need of such assistance and the trustees should approve, a preference being given to those who had been students of that institution. The court said, if the fund had been intended to become part of the general funds of an established charitable institution, it would not be necessary to make the Attorney-General a party; for the Attorney-General could have no interference with the general funds of the institution. But the court would not permit this fund to come into the hands of the particular persons filling these offices, but will take care to secure the objects of the testator by the creation of a proper and permanent trust, and will send it to the Master for that purpose, and give the Attorney-General an opportunity to attend at the hearing before the Master. Charity cases in the English courts of chancery, and before the Chancellor under commission from the crown, must now, in general, be prosecuted in the name of the Attorney-General. *Corporation of Ludlow v. Greenhouse*, 1 Bligh, n. s. 17, 61, 62, 68. But where the gift is not a charity within the statute, no information lies in the name of the Attorney-General to enforce it. *Attorney-General v. Hewer*, 2 Vern. 387.

¹²⁴ *Collyer v. Burnett*, Taml. 79; *Mitford v. Reynolds*, 1 Phill. C. C. 185,

special * circumstances, the court will only order the inter- * 521 est paid over.¹²⁵ The Court of Chancery discourages the investment of the funds of a charity in lands.¹²⁶

48. Gifts over, where the primary gift to charity failed for illegality, were also held void at one time.¹²⁷ But the contrary doctrine seems now to be well settled.¹²⁸

49. The subject of the excess of the income of charitable devises, above what is required to maintain the specific duties imposed upon the trustee, has formed the subject of a good deal of discussion in the English courts of equity, and is beginning to attract some attention in the courts of this country. The earlier decisions upon the subject inclined to the view that the increased income should be applied in the same manner directed by the testator in regard to the specific appropriations for charity.¹²⁹ And where the instrument of donation contains a general declara-

194; *Mayor of Lyons v. East India Company*, 1 Moore, P. C. C. 273, 293. The funds for the establishment of the present Smithsonian Institution at Washington, given by the will of Mr. Smithson, an Englishman, domiciled in England, were obtained by a suit in the name of the President of the United States of America *v. Drummond*, the executor, and was decided at the Rolls in 1838, cited, both by counsel and the court, in *Whicker v. Hume*, 7 Ho. Lds. Cas. 124. But a bequest to such persons as the judges of the supreme court of another state shall appoint to receive it is void everywhere, if unlawful in the state where made. Such a bequest in New York, for the purpose of founding and maintaining an institution for the education of females in another state, was held void. But if it had been made to a society or institution having authority to receive and expend the funds according to the directions of the will, it might have been upheld. *Bascom v. Albertson*, 34 N. Y. 584. But in Pennsylvania, *McLain v. School Directors*, 51 Penn. St. 196, it was held that the court will disregard the uncertainty of any object of a charitable use, and will not suffer it to fail by the exercise of the discretionary power of those appointed to carry out the testator's intention.

¹²⁵ *Attorney-General v. Lepine*, 2 Swanst. 181; *Attorney-General v. Sturge*, 19 Beav. 597.

¹²⁶ *Attorney-General v. Wilson*, 2 Keen, 680.

¹²⁷ *Attorney-General v. Tyndall*, 2 Eden, 207. But in a former case the same judge, Lord *Northington*, had held the gift over to be valid. *Attorney-General v. Tancred*, 1 Eden, 10.

¹²⁸ *De Themmines v. De Bonneval*, 5 Russ. 288; *Robinson v. Robinson*, 19 Beav. 494; *Carter v. Green*, 3 Kay & J. 591; *Warren v. Rudall*, 4 Kay & J. 603, 618; Lord *Eldon*, in *Sibley v. Perry*, 7 Ves. 522. See also *Fisk v. The Attorney-General*, Law Rep. 4 Eq. 521.

¹²⁹ *Thetford School*, 8 Co. 130 b; *Attorney-General v. The Mayor of Coventry*, 2 Vern. 397; *Attorney-General v. Sparks*, Amb. 201.

tion that the donor intends the whole gift for charity, and the specific payments do not exhaust the whole income, any surplus will belong to the charity.¹⁸⁰

50. So also if the donor, without making any such general * declaration, nevertheless give a scheme for his charity, which exhausts the whole income, any increased income will go ratably to the same objects. But in such case, if the scheme do not exhaust the whole income of the fund, any surplus will belong beneficially to the trustee.¹⁸¹

51. And it seems to have been the practice in England, from the earliest times, for colleges and other charitable institutions, to whom donations for the accomplishment of specific charities had been made, to apply any surplus income of the fund to their general purposes.¹⁸²

52. And where the whole income of a fund is given to a specified charitable institution for the accomplishment of certain specified objects, or the donor makes a scheme, exhausting the whole income, the courts of equity, in appropriating any surplus income which arises thereafter, have authority to alter, not only the proportions in which the different objects of charity would take under

¹⁸⁰ *Attorney-General v. The Drapers' Company*, 2 Beav. 508; *Attorney-General v. The Coopers' Company*, 3 Beav. 29.

¹⁸¹ *Thetford School Case*, 8 Co. 130 b; *Attorney-General v. The Skinners' Co.*, 2 Russ. 407; *The Mercers' Co. v. The Attorney-General*, 2 Bligh, N. S. 165.

¹⁸² Lord *Eldon*, in *Attorney-General v. Mayor of Bristol*, 2 Jac. & W. 294, 317. "The charges have been made good from time to time, and the surplus has been taken by the college itself; and I believe, if this were considered an improper application of their funds, it would have the effect of disturbing the distribution of the revenues of many of the colleges in both universities." In a late case, *Attorney-General v. Marchant*, Law Rep. 3 Eq. 424, where the trust was to pay £20 for the salary of a schoolmaster, £20 to a college for the purchase of books, and £5 each to the poor of two parishes, and there had been an increase of the income and a call for a new scheme, the court held that the whole increase should be ratably divided between the two first objects, but that, the gifts to the poor being objectionable in principle, the court would not augment them. Vice-Chancellor *Kindersley* here goes into an elaborate argument to show that charitable bequests for poor people not absolutely pauperized have a natural tendency to render them so, and is therefore a detriment, both to the parish who are made the trustees and almoners of the bounty, and also to the objects of the bounty. See *Attorney-General v. Sidney Sussex College*, L. R. 4 Ch. App. 722.

the original instruments, but even to change the objects.¹⁸² But this latter is done but rarely, if ever, of late.

53. If the donation is made to depend for its continuance upon the donee performing the duties required by the donor, the courts infer that the donor expected the donee to take beneficially any income which might arise beyond the specific payments which were required to be made by the donee as a condition upon which * he was to be allowed to hold the donation.¹⁸³ But * 523 where the donor defines the amount which the donee is to have of the income for his services, and this, together with the specific appropriations, exhausts the whole income, it is then held that any increased income shall be distributed ratably, in the same manner the testator directed the first appropriation to be made.¹⁸³

54. But where there is a clear gift of the surplus income of a bequest to charity to the trustee or donee, there can be no subsequent increase of the specific appropriations.¹⁸⁴

¹⁸³ Sir John Romilly, M. R., in *Attorney-General v. South Molton*, 14 Beav. 357; Same *v. Wax Chandlers' Co.*, L. R. 8 Eq. 452.

¹⁸⁴ *Mayor of South Molton v. The Attorney-General*, 27 Eng. L. & Eq. 17; s. c. 5 Ho. Lds. Cas. 1. Lord St. Leonards here declares: That where the general gift is to a college or other charitable body, whether incorporated or not, and certain objects are specified, upon which the trustee is to expend certain specified amounts, and these do not exhaust the whole income, and no appropriation is made of the surplus, whether it is defined or not, it will go to the trustee beneficially, or be expended for the general objects of charity for which the donee exists. "Where the surplus is given qua surplus, that surplus must carry the whole increase of income." The same principle is held in numerous other cases. *Attorney-General v. The Skinners' Company*, 2 Russ. 407; *Attorney-General v. Gascoigne*, 2 My. & K. 647; *Attorney-General v. Cordwainers' Co.*, 3 My. & K. 534. See also *Attorney-General v. The Master of Catherine Hall, Jacob*, 381. This subject underwent a very thorough revision before the House of Lords, in the case of *The Attorney-General v. The Dean and Canons of Windsor*, in May, 1860, 6 Jur. n. s. 833, s. c. 8 W. R. 477, when the following propositions were established:—

1. "Where an apportionment is made among different charities of the whole of the rents of an estate, either by will or other instrument, and such rents afterwards increase, the charities shall share among them the increased as well as the original rents." [But where the funds are misapplied, the trustees will not always be allowed the appropriations to enlarge the schemes in consequence of the increase of the income. *Attorney-General v. Christ Church, Jac.* 474. See also *Same v. Wisbech*, 6 Jur. 655.]

2. "Where the founder of a charity conveys land to persons for the purpose of securing through their agency certain pecuniary benefits of specified

* 524 * 55. In endeavoring to determine the state of the law in the American courts in regard to charitable uses, it is

amounts to various objects of charity, and the sums so devoted to charity do not exhaust the whole revenue, there is no rule of law which says that the surplus rents may not have been intended as bounty to the persons in whom the estate has been vested; and they will be entitled, unless an intention appears that they should share ratably with the other objects of his bounty."

This question underwent considerable discussion in *Attorney-General v. Trinity Church*, 9 Allen, 422, and the rules of law above stated were there confirmed. See also *The Attorney-General v. Marchant*, 12 Jur. n. s. 957, L. R. 3 Eq. 424, where some of the stipends were increased, and others not, in the discretion of the court. Ante, n. 132. See also *Attorney-General v. Wax Chandlers' Co.*, L. R. 5 Ch. App. 503, where the doctrine of the text is confirmed. It is matter of construction by the court when it is all given to charity. *Merchant Taylors' Co. v. Attorney-General*, L. R. 11 Eq. 35; *Merchant Taylors' Co. v. Attorney-General*, L. R. 6 Ch. App. 512. But in the House of Lords, L. R. 6 Ho. Lds. 1, the judgment in *Attorney-General v. Wax Chandlers' Co.* was reversed by the concurring opinion of all the judges. It seems to have been here considered that all the cases of this character naturally divide themselves into two general classes:—1. Where the gift is made strictly upon condition that the devisee make certain specified payments to charity named in the devise, and that he keep the estate in repair, which embraces rebuilding in case of destruction by fire or otherwise. In this class of cases the devisee takes beneficially, subject to the performance of the condition. 2. Where the estate is given in trust for charity, the donor specifying what he supposes at the time will exhaust the income. It is here said, with much force, that no particular forms of language ought to be held at all decisive in regard to the particular class to which the court will reduce any particular case of this character. Hence little stress can be placed upon the use of the word "condition." It may mean the same as "intent and purpose," and may be employed to create a trust, and nothing more. If such be, upon the whole case, the conclusion to which the court come, the devisee is a mere trustee, and the whole income must be applied to charity, and the scheme enlarged, if need be, for that purpose. In *Chamberlayne v. Brockett*, L. R. 8 Ch. App. 206, the testatrix declared, as the reason for devoting her estate to charity, that she could not feel confidence that any of her relatives would spend her money in the way she would approve. She then gave her residuary personal estate, to be invested by trustees named in consols, and out of the income certain fixed annual payments to be made for charitable purposes which were specified. She further directed, that when, and so soon as, land should be given for the purpose, almshouses should be built in three specified places, and that the surplus remaining after that should be expended in making allowances to the inmates. Lord Chancellor Selborne held, the Lords-Justices concurring, that, if the estate had been given solely upon the conditions named in the will for expending the residue, it might have been void for remoteness; but, as the testatrix had devoted the whole estate to charity, that will

observable that it was declared in many of the states nearly at the same date, by a singular coincidence, that the substance of the statute of the 43 Elizabeth was in force in those states.¹⁸⁵

effectually cut off all claim of the next of kin, and the court of chancery will administer it, as nearly in conformity to the scheme in the will as the law and circumstances will permit, according to the rule called *cy pres*. See ante, n. 117.

¹⁸⁵ *Gass v. Wilhite*, 2 Dana, 170, Spring term, 1834; *Going v. Emery*, 16 Pick. 107, October term, 1834; *Executors of Burr v. Smith*, 7 Vt. 241, February term, 1835. These cases were pending for years, concurrently, in three remote states, and were decided the same way, without any communication with each other. In *Griffin v. Graham*, 1 Hawks, 96, it was held, at an earlier day, that the people of this country succeeded to all the prerogatives of sovereignty vested in the English monarch, and that the special jurisdiction of the Chancellor in matters of charity, by virtue of representing the king as *parens patriæ*, resides in the courts of equity in North Carolina, and that the statute 43 Elizabeth is in force there. In Georgia, *Beall v. Fox*, 4 Ga. 404, the jurisdiction of the courts of equity in matters of charity is vindicated to the same extent, independent of the English statute. In Virginia and Maryland it is denied that either the statute, or the principles which it embraces, are in force. *Gallego v. Attorney-General*, 3 Leigh, 450; *Dashiell v. Attorney-General*, 5 H. & J. 392; s. c. 6 H. & J. 1; *Janey v. Latane*, 4 Leigh, 327; *Wilderman v. Baltimore*, 8 Md. 551. But in *Beatty v. Kurtz*, 2 Pet. (S. C.) 566, it was decided by the Supreme Court of the United States, that the Bill of Rights in Maryland recognizes the principles of the statute of charitable uses to such an extent as to legalize a dedication of land for religious and pious uses, as the burial of the dead. There can be no longer any question entertained in regard to the existence in the English Court of Chancery, before the statute of Elizabeth, of an independent power of administering charitable trusts, where the beneficiaries of the trust were too indefinite to be identified, or to enforce the trust on their own behalf. The investigations of the Record Commissioners there, many years since, disclosed many cases of that character before the date of the statute. And the same jurisdiction, and substantially to the same extent as in the English courts, is now exercised in all the American states, with the exception of Maryland and Virginia, and one or two more, perhaps, where the question remains in doubt. In addition to the cases already referred to, as showing the views maintained upon this question in the different states, we may refer to *Wade v. The American Col. Society*, 7 Sm. & M. 663, 695; *Potter v. Chapin*, 6 Paige, 639; *Moore v. Moore*, 4 Dana, 354; *Baptist Church v. Witherell*, 3 Paige, 296; *Burbank v. Whitney*, 24 Pick. 146, 152, 153; *Bartlet v. King*, 12 Mass. 537; *Sanderson v. White*, 18 Pick. 328; *Bartlett v. Nye*, 4 Met. 378; *Washburn v. Sewall*, 9 Met. 280. This whole subject is very lucidly and learnedly discussed by Mr. Justice *Wilde*, in *Burbank v. Whitney*, 24 Pick. 146, 150, and charitable bequests upheld to the fullest extent. In a late case in the New York Court of Appeals (*Williams v. Williams*, 4 Seld. 525), this subject is learnedly

* 525 The case in Kentucky * is a remarkable one, and deserving a more particular notice than our time and space will allow.

reviewed, and the following points determined: That the law of charitable uses, as it existed in England at the time of the Revolution, and the jurisdiction of the Court of Chancery over the subject, became the law of this state upon the adoption of the Constitution of 1777, and has not been repealed. It does not derive its origin from the statute 43 Eliz. ch. 4, nor depend upon it. It was borrowed from the civil law, as modified by the institutions of Christianity, and at a very early period became a part of the common law. The statute of Elizabeth merely furnished a remedy for the abuse of charities. It was never applicable to the circumstances of this country, and could never have been executed in it. This statute was formally repealed in the States of New York and Virginia at an early day, and may have been so repealed in some of the other American states. In the case of the executors of *Burr v. Smith*, 7 Vt. 241, the court held that the general principles of the English law of charitable uses antedated the statute of Elizabeth, and were adopted in that state as part of the English common law, not inapplicable to the circumstances and condition of its people, and a charitable bequest to the treasurer for the time being of an unincorporated benevolent society was upheld. *s. p. Williams v. Pearson*, 38 Ala. 299. See post, n. 141. In the case of the *Dutch Church v. Mott*, 7 Paige, 77, it was declared that the statute of 43 Elizabeth, ch. 4, was never in force in New York, but that the Court of Chancery had inherent jurisdiction to enforce the performance of trusts for pious and charitable uses where the devise was made to a trustee capable of taking the legal estate; and that the conveyance of the site for a church to natural persons by name, for the use of the ministers, elders, and deacons of such church and their successors, to have a church erected thereon, and for no other use whatever, was a valid conveyance at common law to a charitable and pious use; and the Court of Chancery will enforce its performance upon the ground above stated, and that no violation of the trust would have the effect to revest the title, either legal or equitable, in the heirs of the grantor. *s. p. Sanderson v. White*, 18 Pick. 328. And if the church or congregation is afterwards incorporated, the court will, after a great lapse of time, presume the release of the legal title to the corporation. And in *Stone v. Griffin*, 3 Vt. 400, it was decided that an unincorporated church or society cannot hold real estate devised to them either by name, or the name of office of some officer of such church or society, but they may take the use of real estate devised to trustees for their benefit; and if the trustees decline the trust, or none are named, the heir at law may be compelled to execute the trust, or to convey to such trustee as the Court of Chancery may appoint. But see *Jackson v. Hammond*, 2 Caines Cas. 337. And principles similar to those stated in the three preceding cases are declared in *Vidal v. The City of Philadelphia*, 2 How. (U. S.) 127, where it was held that a bequest to the defendants in trust for the establishment of a college for poor orphan boys is a valid trust in that state, notwithstanding the exclusion, by the terms of the bequest, of all ecclesiastics, missionaries, and ministers of all sects, from

56. It was a bill brought by two dissenting members of the society of Shakers to obtain their share of the common stock of * property. It is assumed by all the members of * 526 the court that the gift to the society of the property of the plaintiffs, when they formed their connection with it, cannot be maintained as a perpetual and irrevocable gift, unless it can be shown that the use was a charitable one, within the spirit and intent of the statute of Elizabeth. A majority of the court (two judges) held that a Shaker community was within the statute of Elizabeth, and one judge dissented. There is not in the English statute any object bearing the remotest analogy to a Shaker community. All the objects enumerated in the statute have reference to charitable objects outside of the organization to which the income of the fund, or the fund itself, is intrusted.

exercising any trust or duty concerning the college, or from admission for any purpose, or as visitors. The latter provision seems to have been held by the court as excluding the classes of persons named from entering the grounds of the college for any possible purpose; but it has always seemed to us, that, if it had received a much narrower construction, it would have been more in concurrence with the decided cases, as only intended to exclude them from all official connection with the charity. In *Kentucky, Attorney-General v. Wallace*, 7 B. Mon. 611, a bequest to be applied to the dissemination of the gospel at home and abroad was held a valid charitable trust; and upon any failure of trustees, the Court of Chancery, upon application of the Attorney-General, will appoint and enforce the trust, but will not control any discretion reposed in the trustees. It was here held that the trustees of such a charity had power upon general principles to sell real estate and compromise suits respecting it under the direction of the court. In *Norris v. Thomson*, 4 C. E., Green, 307, it was held that the purpose of the statute 43 Eliz. in England was not so much to define charitable uses as to establish such gifts as had before been held void on account of the indefiniteness of their objects. And it is also declared that the provisions of that statute have never been in force in New Jersey. But, in *Attorney-General v. Moore*, id. 503, it was declared that the Court of Chancery in that state has an extensive jurisdiction over the subject of charitable uses to uphold, protect, and enforce their execution; but this does not extend to all the incidents of such trusts. Its jurisdiction can only be invoked in exceptional cases, as where there is no trustee capable of holding the estate or performing the trust, or where the objects are indefinite and require definition, or the original purpose has become impracticable. In other cases the administrator is wholly under the control of the trustee; and the court can only interfere in cases of abuse or neglect of duty by the trustee, and then under its general power to enforce the execution of trusts. The doctrine of *cy pres* does not exist in West Virginia. *Venable v. Coffman*, 2 West Va. 310.

* 527 * 57. But a Shaker community is intensely separate from all connection with the outer world, and, at most, only proposes to take care of itself. It is not, therefore, any more a charity than an indefinite mercantile partnership, where the families of the partners are to be supported out of the common funds. And the consideration that it is one professed principle of these communities, that no increase in its numbers is to be had or tolerated by the ordinary process of the multiplication of the human race by means of the family relation, and that the very principle of the association is, when carried to its ultimate results, destructive of the race itself, would certainly incline us to the view taken of the case by the dissenting judge, *Underwood*, whose reasoning is able, but less satisfactory than if he had more thoroughly reviewed the cases. There are some cases where similar associations have been held not charitable, but private and personal. Thus in Pennsylvania it has been decided that such an association as the Odd Fellows is not a charity; and although one object of the society is to relieve indigent and necessitous members, this will not render it a general charity, so that the courts of that state could regard its funds as coming within the spirit of the statute of Elizabeth.¹³⁶ It is here said, that, in the absence of an act of incorporation, such an association is to be regarded in the light of a partnership. But in New Hampshire, money accumulated in a Freemasons' lodge, to be applied "for the good of the craft, or the relief of indigent, worthy, and distressed masons, their widows and orphans," was held to be for a charitable use, and that, upon the dissolution of the lodge, the property could not be divided among the members.¹³⁷ But there is a broad distinction between such an association, which is mainly charitable, and an industrial association, like a phalanstery, or the followers of St. Simon, or of Socialism generally, whose organization is exclusively for the general purpose of subsistence for themselves, and not for the relief of others.

58. This subject has come before the United States Supreme

¹³⁶ *Babb v. Reed*, 5 Rawle, 151. The same principle is maintained in *The Domestic and Foreign Mission's Appeal*, 6 Casey, 433; *The Evangelical Association's Appeal*, 11 id. 316.

¹³⁷ *Duke v. Fuller*, 9 N. H. 536. And a similar view is taken of a Freemasons' Lodge, in *Vander Volgen v. Yates*, 3 Barb. Ch. 242; but the point was not much considered. See *Baptist Society v. Wilton*, 2 N. H. 508.

Court on many different occasions ; but their determinations are * controlled by the law of the particular district where * 528 the question arises. Thus, in *Baptist Association v. Hart*,¹³⁸ and in *Wheeler v. Smith*,¹³⁹ both of which arose in the State of Virginia, where the statute of 43 Elizabeth is not in force, and where the courts have not taken jurisdiction of charitable trusts, it was held that the national courts must follow the same course ; while, in the case of *Vidal v. Girard's Executors*,¹⁴⁰ it was held that the common law in relation to charities was in force in Pennsylvania, where the case arose, and it was therefore held, that, being a charitable gift, the court would administer it upon the basis of the rules of the English chancery.

59. It seems to have been supposed by the court, in *Baptist Association v. Hart*, that courts of equity, upon general principles of equity jurisprudence, independent of the statute of 43 Elizabeth, could not maintain a charitable trust where no legal interest was

¹³⁸ 4 Wheat. 1. See also *Andrew v. New York Bible and Prayer-Book Society*, 4 Sandf. S. C. 156 ; *Holland v. Peck*, 2 Ired. Eq. 255.

¹³⁹ 9 How. 55.

¹⁴⁰ 2 How. (U. S.) 127. But in a subsequent case, upon the same will, *The Heirs of Girard v. The City of Philadelphia*, 7 Wallace (U. S.), 1, to obtain a declaration of the court as to the nature and validity of the provisions of the bequest for the benefit of the city, it was declared by the court that the general bequest for creating a charitable use having been declared valid in the former suits, and the city of Philadelphia being the residuary legatee of the estate, the heirs can have no possible interest in the questions affecting the validity of the secondary trusts in the will for improving the police of the city, or the city property and appearance, and to diminish taxation, as no contingency has yet arisen for applying any of the income towards those objects, the pecuniary trust for the college demanding the whole income at present ; nor could the heirs ever have any interest in regard to the operation of enlarging the area of the city, and changing to some extent its corporate organization, upon the competency of the corporation to perform the trusts imposed by the will ; for, granting all the disqualification claimed in regard to the competency of the trustee to discharge these functions as at present constituted, this court would on application supply a new trustee. So that in no possible event contemplated in the suit could the heirs of the deviser have any imaginable interest in the questions attempted to be raised. But the court intimate a very decided opinion, that the changes effected by the legislature in the extent and character of the corporation cannot affect its right to hold property, real or personal, either beneficially or in trust ; and that it will be time enough to determine whether the old or the new city are to reap these benefits, when any such benefits are likely to accrue to either.

vested in any trustee with direction to carry the trust into effect, and where the trusts were so vague that no cestuis que trustent * 529 could * be so identified as to enable them to come into a court of equity and claim the intended benefit on their own behalf.¹⁴¹

¹⁴¹ It was originally made a serious question, whether the Court of Chancery had any jurisdiction over charities at common law. But it seems now, as we have said, entirely well settled that such was the fact. 2 Story, Eq. Jur. §§ 1154 a, 1154 b. This question is discussed by Lord *Eldon*, in *Attorney-General v. Skinners' Company*, 2 Russ. 407, 420; by Sir *John Leach*, M. R., in *Attorney-General v. Brentwood School*, 1 My. & K. 376; by Lord *Redesdale*, in the House of Lords, in *Attorney-General v. Mayor, &c. of Dublin*, 1 Bligh, N. S. 312, 347, 348; by Lord *St. Leonards*, in *Incorporated Society v. Richards*, 1 Dru. & War. 258; all of whom concur in the result that there is an inherent jurisdiction in equity in cases of charity, and that charity is one of those objects for which a court of equity has at all times interfered to make good that which at law was an illegal or informal gift. And the same result has been reached by the majority of courts of equity in America. The Supreme Court of the United States, in *Vidal v. Girard's Executors*, 2 How. (U. S.) 127, 155, 196, examined all the leading authorities up to that date, and reached the conclusion that there was a jurisdiction in chancery over charitable trusts antecedent to the statute of Elizabeth, and that this had always been the recognized common law of the State of Pennsylvania, notwithstanding the statute of Elizabeth had never been in force there. See also *Andrew v. New York Bible and Prayer-Book Society*, 4 Sandf. S. C. 156; *Ayres v. Methodist Church*, 3 id. 351; *M'Cord v. Ochiltree*, 8 Blackf. 15, 21; *Beall v. Fox*, 4 Ga. 404; *Miller v. Chittenden*, 2 Clarke, 315; *Carter v. Balfour*, 19 Ala. 814; *Dickson v. Montgomery*, 1 Swan, 348; *Fontain v. Ravenel*, 17 How. (U. S.) 369; *Williams v. Williams*, 4 Seld. 525. See also *Holmes v. Mead*, 52 N. Y. 332. When this subject came before the United States Supreme Court, in the case of *Fontain v. Ravenel*, supra, where a testator empowered his executors to distribute the residue of his estate, after the decease of his widow, among such charitable institutions in South Carolina and Pennsylvania as they might deem most beneficial to mankind, and the wife survived the executors, it was held, that whatever might be the power of the Lord Chancellor of England, as representative of the crown and of the king as *parens patriæ*, by virtue of his commission under the privy seal, it was not competent for that court to execute such a trust, there being no existing trustee to exercise the discretion reposed by the testator, and the objects of the trust being altogether indefinite, and impossible of being ascertained without the exercise of that discretion. But in *Wright v. Trustees of M. E. Church*, 1 Hoffman, Ch. 202, it was held that the jurisdiction of the Chancellor was as extensive in administering charities in this country as in England under the commission of the privy seal. But this is denied in *Ayres v. Trustees of M. E. Church*, 3 Sandf. S. C. 351. See also *King v. Woodhull*, 3 Ed. Ch. 79; *Knis-kern v. Lutheran Churches*, 1 Sandf. Ch. 439; *Banks v. Phelan*, 4 Barb. 80.

60. In some of the states it has been held that the courts will * not only supply a trustee in the case of charitable * 530 trusts, but will aid him in carrying into effect the purposes of the trust.¹⁴² We may refer to the case of *Hadley v. Hopkins Academy*,¹⁴³ where the subject of charitable trusts is examined somewhat at length by *Shaw*, Ch. J. The learned judge there said : "It is a rule in equity, that a gift of real or personal estate, either inter vivos or by will, to promote education, is a charity. . . . Such a gift to a charitable use is to receive a most liberal construction ; and if the trustees pervert the fund to other uses, or even if they refuse to accept or execute the trusts, the charity itself shall not fail, nor will the property revert to the donor. But it will be competent for a court of chancery to direct, in the former case, that the trust shall be executed, and in the latter that new trustees shall be appointed, in whom the legal estate shall vest, to be holden in trust for the purposes of the charity." And this principle was extended in another case,¹⁴⁴ so far as to appoint a trustee to carry into effect a bequest to the "Marine Bible" Society, there being no society of that name in existence, but it appearing that at, or shortly before, the time of making the will, there had been a voluntary association in being by the name of "The Boston Young Men's Marine Bible Society," the object of which was to distribute "Bibles among destitute seamen," but which had been dissolved shortly before the death of the testator, the court being satisfied, from the surrounding circumstances, that this was the society intended by the testator. The trustee in this case was directed to apply the avails of the charity in the purchase of Bibles to be distributed among destitute seamen, and in defraying the expense of the distribution, as nearly as might be, in conformity with the constitution of the society which the donor had in mind.

61. The objects coming within the scope of chancery jurisdic-

Gibson, Ch. J., said in *Pickering v. Shotwell*, 10 Penn. St. 23, 26, "The essential provisions of the statute of charitable uses have been assumed here as an essential part of our law, as they must have been had the statute never been enacted."

¹⁴² *Parker v. May*, 5 Cush. 336; *Brown v. Kelsey*, 2 Cush. 243; *Bartlett v. Nye*, 4 Met. 378.

¹⁴³ 14 Pick. 240, 253. It is here said that long-continued usage is of weight in establishing a particular construction of a charitable trust, as the one intended by the donor. See *Green v. Allen*, 5 Humph. 170.

¹⁴⁴ *Winslow v. Cummings*, 3 Cush. 358.

tion over charity in this country are numerous, and somewhat diverse. Chancellor *Kent*, in an early case,¹⁴⁵ held that a legacy of a sum of money to a town, for the purpose of erecting a town-house for transacting town-business, was valid as a charitable bequest; adopting Lord *Camden's* definition of a charity,¹⁴⁶ — “a gift to a general public use, which extends to the poor as well as the rich.” And in Pennsylvania a bequest, to be applied under the direction of the Society of Friends, the monthly meeting of Friends of Philadelphia for the northern district (which was not an incorporated society), as a fund for the distribution of good books among poor people in the back part of Pennsylvania, or for the support of a free school or institution in or near Philadelphia, was maintained as a good bequest to charity.¹⁴⁷ So of a bequest

¹⁴⁵ *Coggeshall v. Pelton*, 7 Johns. Ch. 292.

¹⁴⁶ *Jones v. Williams*, Amb. 651. This was a bequest for supplying water for the use of the inhabitants of a town. His lordship said, “The supplying of water is necessary, as well as convenient, for the poor and the rich.” And the courts in the State of New York seem to have proceeded upon the ground, that the statute of Elizabeth was never in force in that state, but that, independent of that statute, the Court of Chancery had an original jurisdiction to enforce the performance of trusts for pious and charitable uses, when the devise or conveyance in trust was made to a trustee capable of taking the legal estate. *Reformed Protestant Dutch Church v. Mott*, 7 Paige, 77. The including of pious trusts among charitable uses is somewhat of an extension of the original meaning of the latter term as used in England, where pious and charitable uses are by no means coextensive. But in this country religious and pious uses embrace the chief department of charity, and hence the terms have become nearly interchangeable. But a reference to the objects enumerated in the statute of Elizabeth, which forms the basis of all charitable uses in England at the present day, will show that almost none of them are what we may properly call pious or religious uses. Ante, pl. 11.

¹⁴⁷ *Pickering v. Shotwell*, 10 Penn. St. 23. But a bequest to be expended according to the discretion of the executors, in the establishment of a school at a particular place for the education of children, was held not to be a public charity. *Attorney-General v. Soule*, 28 Mich. 153. As already intimated, there seems to be no question in regard to the law of wills, where such a departure from the established principles of the English law will be found in the American decisions, as in regard to what shall be declared public charities. It might not be difficult to find decisions in this country overruling or disregarding almost every point in the English law affecting the subject of charitable trusts. It seems to have arisen, in a large degree, from the adherence of the English courts to the principles of the 43 of Eliz., which is little known here, and seldom followed with any degree of strictness; while, on the other hand, the question here seems to have been regarded from the popular view of

for free schools ; and where the trustees are not properly named, the court will supply them.¹⁴⁸ So also of a devise of land for the site of a free school for the benefit of poor children, and a lecture-room for public worship, and a lot for a dwelling-house for the minister of a certain church.¹⁴⁹ And in tracing the reports of charity cases in this country, it will be found that the majority of such cases are for the maintenance of institutions of a religious or semi-religious character. That is true of all those religious societies in the country, like Bible Societies, Prayer-Book and Missionary Societies, Tract Societies, Societies for the support of superannuated ministers, Education Societies for supplying the ministry, and numerous other societies, which exist in connection with almost all the religious * denominations in the * 532 country, and which disburse almost all the funds given, either inter vivos or by way of testamentary disposition, by the members of these different denominations, and others connected with their congregations, friendly to their extension. All these very numerous societies absorb a large proportion of the charitable funds in this country ; and almost all the charity suits in the country concern some of these societies, or else have reference to education in some form. While, on the other hand, many of the objects named in the statute of Elizabeth as charitable, such as repairing highways, ports, havens, bridges, relief of the poor, houses of correction, taxes, &c., have here been given up exclusively to state or municipal control, and many others there enumerated do not exist here to any appreciable extent ; while religion, which in England is scarcely regarded as an object of charitable trust, being there chiefly under legal supervision and control, is here the lead-

what ought to be regarded as commendable charitable objects, very few of which are even remotely related to any of those enumerated in the English statute of charitable trusts. There is some apology for this in the fact that so large a proportion of the latter have, by lapse of time and change of social relations, become measurably obsolete. At the present time, especially in this country, there are few subjects in regard to which a statute, carefully and discreetly chosen, would be more useful than that of charitable trusts. But most of our statute-makers are at present engaged in enterprises of more immediate and personal concern. This renders it next to impossible for any one to calculate in advance what will or will not be declared charitable in this country, as we before said.

¹⁴⁸ *McBride v. Elmer*, 2 Halst. Ch. 107.

¹⁴⁹ *Baldwin v. Baldwin*, 3 Halst. Ch. 211.

ing one in that respect. Thus it is said in a late case in Pennsylvania: ¹⁵⁰ "Nothing is better settled than that religious societies, whether incorporated or not, have capacity to take and hold charitable bequests." The bequest there in question was to a religious denomination called the Evangelical Association, and embracing members in the different states and in Canada, and with no direction how it should be applied, except what was inferrible from the general nature and objects of the association; and still it was maintained by the court upon that ground alone, citing * 533 many * cases in the American courts where such had been the rule adopted.¹⁵¹ *Denio*, Ch. J., said, in *Owens v. The*

¹⁵⁰ The Evangelical Association's Appeal, 35 Penn. St. 316, 319. But in Virginia (*Seaburn v. Seaburn*, 15 Gratt. 423), the doctrine of the English courts in favor of indefinite bequests to charity is repudiated. And in a recent case in Maryland (*Wilderman v. Baltimore*, 8 Md. 551), it was held in regard to a bequest for the relief and support of the indigent and necessitous poor persons who may, from time to time, reside within the precincts of a certain ward in the city of Baltimore, that there is no jurisdiction in chancery to set up a charity so vague that the cestui que trust can only be designated by the arbitrary discretion of the trustees. But this is true to a great extent of all charitable provisions for necessitous poor persons; and the decision goes upon the admitted ground, that courts of chancery in that state have no jurisdiction over charitable trusts. In Tennessee, in *Franklin v. Armfield*, 2 Sneed, 305, charity is defined to be a gift to a general public use, such as the maintenance of schools, academies, and universities, and other lawful educational institutions, without reference to the wealth or poverty of those who might be benefited thereby; and such gifts are not deprived of their character of charitable trusts because the descendants of the founder and of his brothers and sisters, and such of the poor children of the county as the trustees might select, are named as cestuis que trustent.

¹⁵¹ *Magill v. Brown*, Brightly, 347, where bequests to Friends' Yearly Meeting were maintained as good gifts to charity, upon the ground that the legatee's character sufficiently indicated the purpose of the bequest. See *Blenon's Estate*, Brightly, 338, where the character of the legatee was held to determine the nature of the gift. And in *Price v. Maxwell*, 28 Penn. St. 23, a bequest to the West Town Boarding-School was held a charity, on the ground that the donees were a charitable association. Gifts to promote education held charitable. *Chapin v. School District*, 35 N. H. 445. So also to a minister in the city of Boston, to distribute in charity in the usual mode it is done by ministers in that city. *Derby v. Derby*, 4 R. I. 414. A devise to a theological seminary for the education of pious young men, or to endow a professorship, is a good charity. *Trustees v. Kellogg*, 16 N. Y. 83. So of a bequest to a school to form a fund for the salaries of teachers. *Price v. Maxwell*, 28 Penn. St. 23. So also a devise to the Society of Friends' School, which was established by the members of that denomination to educate their own

Missionary * Society of M. E. Church : ¹⁵² “Trusts in favor * 534 of education and religion have always been considered

children in the religious principles of the society, as well as in the ordinary branches of school education, was held a good charitable trust. *Price v. Maxwell*, supra. In the last case, *Lewis*, Ch. J., said: “If we were to attempt a definition which would embrace all gifts for charitable uses, we should adopt the language of the eminent patriarch of our profession, Mr. Binney, as expressed in his argument in *Vidal v. The City of Philadelphia*, 2 How. (U. S.) 127, ‘Whatever is given for the love of God, or for the love of your neighbor, — in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish,’ — is a gift for charitable uses, according to that religion from which the law of charitable uses has been derived. ‘The love of God is the basis of all that is bestowed for his honor, — the building up of his church, the support of his ministers, the religious instruction of mankind. The love of his neighbor is the principle that prompts and consecrates all the rest.’ ‘The currents of these two great affections finally run together; and they are at all times so near that they can hardly be said to be separated.’” This is certainly a very beautiful and just sentiment; but it gives a prominence to that department of benevolence, the support of the Christian Church and her ministers, which, while it is very grateful to the devout feelings of an earnest Churchman and Christian like Mr. Binney, or Ch. J. *Lewis*, or the present writer, be it said with all humility, after all, finds less substantial verification in the history of charitable uses, as marked either by the statute of charitable uses or by the decided cases either in this country or in England, than seems requisite to give much point to the beautiful Christian spirit evinced by the language quoted. But there are many marked indications in the decided cases in America, that Christian benevolence, expended in the maintenance and dissemination of the church and the doctrines of every denomination of Christians, is regarded as not only coming within the range, but as constituting one very leading purpose, of charitable trusts, but by no means the exclusive purpose. Thus, in *Bartlet v. King*, 12 Mass. 537, it was decided that a bequest to trustees for the benefit of a voluntary, unincorporated association, the object of which was the propagation of Christianity among the heathen, was a valid charity or trust for “pious and charitable uses,” although there was at the time no court in the Commonwealth possessing the requisite powers to compel the execution of the trust. And in *Going v. Emery*, 16 Pick. 107, it was decided that a bequest “to the cause of Christ, for the benefit and promotion of true evangelical piety and religion,” and directing the same to be paid to certain persons named, “placing full confidence in their piety, judgment, and integrity, immediately to be by them sacredly appropriated to the cause of religion, as above stated, to be distributed in such divisions, and to such societies and religious charitable purposes, as they may think fit and proper,” created a valid charitable trust within the spirit of the statute of 43 Eliz. ch. 4, which

¹⁵² 4 Kern. 380, 409.

charitable uses. . . . They are expressly mentioned in the statute of 43 Elizabeth, which, in regard to the definition of charities, was declaratory of the common law. . . . But the advancement

* 535 of civilization generally is not * classed among charities in the statute; and I have not been able to find an adjudged case in which it has been held to fall within the legal notion of charity." The learned judge may be quite right here, in most respects; but we think he would be puzzled to find much in the statute of Elizabeth about gifts for the support of religion. The nearest approach to it is, "repair of churches." Perhaps, in a figurative sense, religion may be the best "repair of churches," but that it is not what is commonly understood by the term, all will agree.

62. Some of the American cases have gone great lengths in carrying into effect the intention of the testator, by the nearest approximation, even where there was great indefiniteness in the

was in force in the Commonwealth. And in numerous other cases, in almost all the American states, it has been repeatedly determined, that bequests to the American Board of C. F. M., to the American Bible Society, to the American Tract Society, the American Colonization Society, and to an almost infinite number of similar associations, for the accomplishment of benevolent and religious objects connected with the extension and dissemination of Christian principles throughout the world, might be upheld as valid charitable trusts, without regard to the intervention of trustees specially named by the donor, or to the fact whether such associations were incorporated or not. *Bartlett v. Nye*, 4 Met. 378; *Burbank v. Whitney*, 24 Pick. 146; *Brewster v. McCall*, 15 Conn. 274; *Carter v. Balfour*, 19 Ala. 814; *Ex'rs of Burr v. Smith*, 7 Vt. 241, and numerous other cases, most of which are cited in this chapter. And even a bequest to an unincorporated female society in another state, composed in part of married women, for charitable purposes, was held valid. *Washburn v. Sewall*, 9 Met. 280. And a bequest "to the Methodist Church at Darlington Court-house" (an unincorporated society), "and the preachers of said church and the Pedee Mission, of \$8,000, to be selected by the trustees of said church out of my papers, the income of the same to be distributed by said trustees, according to the several necessities of said church, preachers, and mission," was held a valid charitable trust. *Gibson v. M'Call*, 1 Rich. Law, 174. And in the case of *McLean v. Wade*, 41 Penn. St. 266, a legacy to the Associate Congregation of Shenango was held by the court "clearly for the advancement of religion," and therefore a religious use and also a charitable use, and within the statutes of mortmain. And a devise of land to trustees and their successors, to erect a school-house for the perpetual use of the parties to the deeds, and the inhabitants residing nearer than any other school-house and such other persons as the inhabitants might admit, was held to create a valid charity. *Wright v. Linn*, 9 Penn. St. 433.

objects of the trust.¹⁵³ The want of a trustee in such cases is never any valid obstacle in the way of a court of equity carrying into effect any trust, and more especially one of a charitable character.¹⁵⁴ If either trustees or cestuis que trustent can be ascertained, courts will carry the charity into effect.¹⁵⁵

63. Trustees of a charity, after the administration of the charity has been committed to them, are held, if incorporated, to have acquired such vested rights under their act of incorporation for that purpose, that they cannot be controlled by subsequent legislation made to affect that particular case.¹⁵⁶

64. The American courts have very generally adhered to the rule, that charities for religious purposes shall go in the direction and for the propagation of the doctrines which the donor desired to advance; and for this purpose the particular tenets held by the donor will be inquired into, and, when ascertained, will be presumed to be the doctrines which it was the purpose of the trust to advance. And where there occurs a schism in the body to whom the administration of the trust is committed, and a portion separate from the others, the courts generally continue the administration * with the old organization, unless there has oc- * 536 curred on its part an essential departure in doctrine from the tenets of the founder.¹⁵⁷

¹⁵³ *Witman v. Lex*, 17 Serg. & R. 88; *Moore v. Moore*, 4 Dana, 354.

¹⁵⁴ *Witman v. Lex*, supra; *M'Girr v. Aaron*, 1 Penn. 49; *Methodist Church v. Remington*, 1 Watts, 218; *Morrison v. Beirer*, 2 Watts & Serg. 81; *Zimmerman v. Anders*, 6 Watts & Serg. 218; *Pickering v. Shotwell*, 10 Penn. St. 23; *State v. Gerard*, 2 Ired. Eq. 210; *Antones v. Eslava*, 9 Porter, 527; *Dickson v. Montgomery*, 1 Swan, 348; *Zanesville C. & M. Co. v. City of Zanesville*, 20 Ohio, 483.

¹⁵⁵ *Attorney-General v. Jolly*, 1 Rich. Eq. 99.

¹⁵⁶ *Brown v. Hummel*, 6 Penn. St. 86; post, pl. 76.

¹⁵⁷ *App v. The Lutheran Congregation*, 6 Penn. St. 201; *Combe v. Brazier*, 2 Desaus. 431; *Attorney-General v. Pearson*, 3 Mer. 353, 418. When this case came before Lord *Eldon* in 1817, it was referred to the Master to make certain inquiries, among which was, "What was the nature and particular object (with respect to worship and doctrine) for the observance, teaching, and support of which each and every of the charitable funds was created?" His lordship had before laid down the rule, that, where parties seeking the benefit of a trust for charitable purposes differ as to the mode of carrying it into effect, — one party being for the support of the original system, the other for some proposed alteration to be made in it, — the leaning of the court must be to the former, however useful it may judge the proposed alteration to be.

- * 537 * 65. The doctrine of *cy pres*, by which the English courts of equity supply a scheme for administering such

The terms of the deed here only declared the purpose of the charity to be "for the worship and service of God," which the court held implied, without more, a trust to support worship in the Established Church; but that, nevertheless, it was open to show that the intention of the donor went beyond that, and had reference to the support of some Protestant dissenting mode of worship, and that the court will carry the manifest design of the founder into execution, so far as it is consistent with law, and that for the purpose of reaching such intention the court must inquire what was the religion of the society at the time of the donation. When the case came before Vice-Chancellor *Shadwell*, nearly twenty years later, the learned judge manifested much less delicacy about inquiring into the religious tenets of the founder, and distinctly declared, that, where the fund was given to erect a meeting-house for the worship and service of God, no doctrines ought to be taught in it which are opposed to the opinions of the founder. And in *Attorney-General v. Shore*, 11 Sim. 592, where funds were given by Lady Hewley for the support of Presbyterian worship, she and the donees at the time being Trinitarians, and afterwards the estates having come to the hands of trustees, of whom a majority were Unitarians, though called Presbyterians, and one of them was a member of the Church of England, the court held that neither Unitarians nor members of the Church of England were entitled to administer or participate in the benefits of the charity, and ordered the trustees to be removed, and appointed others in their place, selecting from three different sects of Trinitarian dissenters. And when this case came before the Lord Chancellor, *Lyndhurst*, his lordship said: "It is the duty of the court to give effect to the intent of the founder. It is a principle that is uniformly acted upon in courts of equity." The purpose of the charity here was thus expressed: "To assist poor and godly preachers of Christ's holy Gospel," &c. Lord Chancellor *Lyndhurst* decided the case, with the advice of two of the law judges, Justice *Patteson* and Baron *Alderson*. The learned judges say distinctly, in regard to the proper construction of the deed of trust, "If expressed in doubtful or *general words*, recourse must be had to extrinsic circumstances, such as the known opinions of the founder, the existing state of the law, the contemporaneous usage, or the like." *Shore v. Wilson*, 9 Cl. & Fin. 355, 383. Lord *Lyndhurst* expresses himself satisfied with this opinion, concurring in its results, and without any dissent from the reasons assigned. The case was heard in the House of Lords before the law lords and six of the judges of Westminster Hall, and the judgment of the Vice-Chancellor and of the Chancellor affirmed. Less stress was placed in the House of Lords upon the force of distinct evidence of the particular opinions of Lady Hewley than in the lower courts. Some, perhaps a majority, of the judges, inclined to the opinion that such evidence was not admissible, except as one of the surrounding circumstances, to enable the court to put a reasonable construction upon the language used by her in the deed of donation.

And Mr. Justice *Selden*, in *Robertson v. Bullions*, 1 Kern. 243, goes into a

charities as it * becomes impossible to administer in strict * 538 conformity to the directions of the founder, by making the

very elaborate review of all the English cases upon this subject to show that the religious opinions of the founder of a charity are not of controlling weight in determining the mode of administering the trust. But it seems to us that much of the discussion upon the question, in this form, is one side of the main purpose.

1. It is admitted, on all hands, that the intention of the founder is to be the guide of courts of equity in administering charitable trusts. This is true in the same sense, and to the same extent, certainly, as in regard to deeds and wills generally. And in some respects charitable trusts, being of a public character, and the heirs of the founder having no reversionary interest in the fund, as a general thing, the English courts have seemed disposed to adopt a more unrestrained course of investigation, in order to reach the real purpose of the foundation, than in the construction of private trusts.

2. But whether we limit the construction to the same boundaries as in ordinary private trusts or not, the intention of the founder is to be determined mainly, and as we think entirely, by the words of the instrument of donation. It is the language of the deed or will that must define the character of the trust created.

3. But for this purpose it is proper to resort to many extraneous aids, by way of extrinsic evidence.

(1.) We may inquire into the circumstances of the donor, and receive all the evidence necessary to place the court in the position of such donor, at the time and place, and surrounded by all the circumstances which attended him, at the time he used the words in question.

(2.) We may inquire into the meaning of words used in the instrument of donation, with reference to the circumstances under which they were used, and thus enable the court to judge how far the donor used the words in a general unlimited sense, or in a narrower and more restricted one.

In either of these views, the opinions and position of the donor, upon the particular subject of the charity, become of controlling force in the construction of the instrument of donation. The difficulty in regard to the construction of charitable gifts, especially those of a religious character, arises from the generality of the words used. The donors, either accidentally or to avoid the appearance of narrowness, prefer to use general, universal, catholic terms, as in the case of Lady Hewley, "to assist poor and godly preachers of Christ's holy Gospel." These terms, in their most extended import, will reach to all denominations of Christians. They certainly include those of the English and of the Roman-Catholic churches. But all the counsel and all the judges admitted, without the slightest question, that Lady Hewley did not intend to include ministers of either of those churches. And why was this so self-evident? Chiefly because Lady Hewley was a most vigorous Nonconformist; and all Nonconformists of that day held the ministers of those churches in special abhorrence, and would have used no such terms as applicable to them. The Trinitarian Nonconformists held much the same views of Unitarians, for

* 539 nearest practicable * approach to such directions, has not been adopted in the American states to the same extent

the opposite reasons. This testimony was, then, clearly admissible to show the sense in which she used the terms. This view seems to us to reconcile all the conflict there has ever been upon this point, and in a manner altogether consistent with established principles of construction. It is only inquiring from what region of sect and opinion the donor came, which we can only determine by inquiring with what class or sect he consorted, what principles he advocated or defended. And this is done upon the same principle that we would inquire in what language or dialect the instrument of donation is expressed, and, where terms are used which are susceptible of a peculiar provincial import, whether the donor belonged to that particular province. If, for instance, one belongs to a sect, or to the subdivisions of a sect, which holds all the ministers of every other denomination of Christians as wolves, devouring, but not feeding, the sheep of Christ's flock, as is true of the more bigoted of many narrow sects, how shall we be able to translate the words of such a foreigner, upon the broad manor of Christian charity, without knowing to what sect, and to what particular subdivision of the sect, he belongs? And how can we learn this except by inquiring into his religious opinions, not for animadversion, as Lord *Eldon* said in *Attorney-General v. Pearson*, supra, but for enlightenment, and to enable the court to do justice? The very elaborate case of *Attorney-General v. Drummond*, 1 Dru. & War. 353, decided by Lord Chancellor *Sugden* while Chancellor of Ireland, adopts the cautious view, that, to aid in the construction of such a deed, evidence of the acts, but not of the opinions of the founder, are receivable; and that evidence is also admissible to explain the signification in which ambiguous words and expressions were generally understood at the time of the execution of the deed among those with whom the founder consorted. The learned Chancellor goes into a most elaborate review of the cases, complaining all the time that most of them have received and acted upon the evidence of the peculiar religious opinions of the founder, and finally concludes by saying he will act upon such evidence only "with respect to the admissibility of which there can, I think, be no dispute." Thus, while there seems to be, both in the British and in the American courts, some conflict in regard to the extent to which testimony of the peculiar religious opinions of the founder are receivable to enable the court to give the proper construction to his words, all concur in receiving so much evidence as will enable the court to understand how persons in his particular position use the words; and that includes, when we are inquiring into the latitude or longitude of Christian sects, the peculiar tenets of the founder, else we cannot define his position. The same view is maintained in many American cases. *Princeton v. Adams*, 10 Cush. 129; *Miller v. Gable*, 2 Denio, 492, 548; *Kniskern v. The Lutheran Churches*, 1 Sandf. Ch. 439. In the case of *Winebrenner v. Colder*, 43 Penn. St. 244, the question of adhering to the doctrine of the founder was thus illustrated. The doctrine of the minority, who adhered and submitted to the regular order of the church, local and general, being the true congregation and corporation, if incorporated, was carried

with the other parts of the * English equity jurisdiction over * 540 charities.¹⁵⁸ And in some of the states, trusts for charity fail

to the extent of appointing an officer of court to hold among the members of the congregation an election for ruling elders, the society having fallen into a state of anarchy by not paying such dues as were requisite to continue membership. It was also declared:—

(1.) That the church property was held in trust for the use of such of the congregation as adhered and were willing to submit to the regular order and discipline of the denomination.

(2.) That the majority of the congregation, who had made use of the regular corporate forms to institute an organized resistance to the legitimate authority of their ecclesiastical superiors, and had instituted an expelled minister of the denomination as their pastor, was not the true congregation.

(3.) But that, though in other respects the minority who adhered to the general order of the church were the true congregation, yet, as by the constitution all of each class had ceased to become members by falling in arrears in their contributions for more than one year, a period of anarchy had occurred which must be overlooked; and all of the members, as they were when order still existed, who were desirous of adhering to the congregation and church, and were willing to submit to the congregational and denominational order, were to be considered members, and entitled to vote at a new election to be decreed by the court for church-officers.

It seems to us, that admitting evidence of the opinions of the founder, and of those with whom he consorted in aid of the construction of the instrument of donation, is really nothing more than admitting evidence of general history, or the history of language, to enable the court to expound the terms used, as every one living at the time and conversant with the surrounding circumstances must have done. This subject is more extensively discussed, ante, pt. 1, § 41. The case of *Attorney-General v. Glasgow College*, 2 Coll. C. C. 665, will be found to confirm the views above stated. A very liberal rule of interpretation, under the acknowledged existence of the force and spirit of 43 Eliz. in regard to maintaining the principles of the founder, was adopted in Rhode Island in the late case of *Potter v. Thornton*, 7 R. I. 252. In *Attorney-General v. Moore*, 4 C. E. Green, 503, it was held that the religious tenets of the founder of a charity could only be shown where he had imposed some limitations or restrictions upon its administration, whereby it is rendered necessary to know the opinions of the founder in order to give a proper construction to his language. And in a late English case, *Attorney-General v. Bunce*, Law Rep. 6 Eq. 563, it was held by Vice-Chancellor *Malins*, that bequests for the benefit of the Protestant dissenters called “Presbyterians,” at D., where there had been a strictly Presbyterian chapel and congregation as early as 1662 (the bequests being made from 1716 to 1803), but which before

¹⁵⁸ *McAuley v. Wilson*, 1 Dev. Eq. 276; *Moore v. Moore*, 4 Dana, 354; *Holland v. Peck*, 2 Ired. Eq. 255; *Carter v. Balfour*, 19 Ala. 814.

upon the ground of uncertainty, the same as other trusts,¹⁵⁹
 * 541 which go mainly upon the same ground. * But in some
 cases where very great uncertainty exists, and the testator

the latter date had become essentially Baptist, both in the congregation and ministers, and had so continued for the last seventy years or more, but still called by the former name and the same used in the bequests, might still be applied to the benefit of this chapel and congregation. It was considered that the term "Presbyterian" was used merely to designate the congregation worshipping at that place by that name, and not with any view to define the doctrines to be taught there. But it was said that the present possessors, having enjoyed the use of the bequests for more than twenty-five years past, were now entitled to hold them under the English statute 7 & 8 Vict. ch. 45, called the Dissenters' Chapels Act. It was also said, that if this congregation were not entitled to hold the use under the strict construction of the bequests, as there was no other coming so near the exact designation, it would be proper to give them the benefit of the use under the doctrine of cy pres. The new society of pure Presbyterians, which had been just formed at D. for the purpose of recovering these funds, were treated rather rudely by the learned judge, being alone ordered to pay their own costs, the other parties all having their costs paid out of the charity. This portion of the direction of his honor seems altogether just, but possibly a little unusual, as it seems to proceed upon the assumption of needless intermeddling in the affairs of others, and which did not concern them, when it is supposable they might have believed they were attempting a meritorious service. And in *Attorney-General v. Moore*, 3 C. E. Green, 256, where a Roman-Catholic testator left a fund in trust, to establish an institution called "the St. James Roman-Catholic Orphan Asylum," and the institution until incorporated was to be managed by his trustees or the survivor of them, one of whom was a Protestant, it was held that the name did not of itself show an intent to make the institution denominational, or to subject it to the control of the Roman-Catholic church. But perhaps it is fair to say that this must depend very much upon the stand-point from which the subject is viewed, and that it would not be surprising if some Roman Catholics might possibly view the matter of the testator's intent somewhat differently from the opinion thus expressed by the court. We are all, fortunately or unfortunately, so constituted or educated, that we see matters somewhat more clearly which favor our own views of justice or policy, than when they range themselves in an opposite direction.

¹⁵⁹ *Dickson v. Montgomery*, 1 Swan, 348; *White v. Fisk*, 22 Conn. 31, 54, 55. Mr. Chief Justice *Church*, who was an excellent man as well as a good judge, here presents a somewhat exaggerated view of the English doctrine of cy pres, which is nothing more than a liberal construction of wills in favor of charitable trusts. The bequest in question was of rather a delicate nature to be administered by an American court. It was the gift of not exceeding \$1,000 annually, to be expended by my trustees for the support of indigent, pious young men preparing for the ministry in New Haven. But we think, in all due submission to the decision here, which held the bequest void for

has appointed trustees for the purpose of applying the charities in their discretion, there has been found no difficulty in holding them valid.¹⁶⁰ And in a recent case in Massachusetts, *Metcalfe, J.*, said of a bequest to such charities as should be deemed most useful by the personal representatives of the donee for life: "We have no doubt the bequest to charity is valid. In *Chapman v. Brown*,¹⁶¹ Sir *William Grant* said: 'A bequest to * such * 542 charitable purposes as the executor shall think proper is a good bequest.' And there are also adjudications of this court which are decisive."¹⁶²

uncertainty, that there was no difficulty in carrying the design of the testator into effect, and that it should not have failed by reason of any fancied difficulties in the matter, either on the part of the trustees or the courts. It is better, and, as a general thing, more satisfactory, to do as the English courts do, and most of the American courts have done, and grapple with such difficulties as fairly present themselves; and thus, by avoiding all motive to exaggerate them, they will not be so far magnified as they are very likely to become by being declared insuperable, and consequently embellished, in order to make a fair justification of such a course. In *McCord v. Ochiltree*, 8 Blackf. 15, a bequest to a theological society, the interest of which was directed to be applied to the aid of pious, indigent youths who are preparing themselves for the ministry of the gospel, those only who adhere to the Westminster confession of faith, the seminary being an unincorporated body, was held to be void at law, but good in equity, as a charitable trust under the provisions of the statute of Elizabeth, and by the law of the State of Indiana, independently of that statute. The latter decision seems to us far more creditable to the court pronouncing it, as well as more in accordance with the established doctrines of equity jurisprudence, than that in Connecticut. But the courts in Connecticut, from an early day, manifested an unfriendly or timid disposition toward charitable trusts. In *Greene v. Dennis*, 6 Conn. 292, the court plant themselves upon the narrow ground of the case of *Baptist Association v. Hart's Executors*, 4 Wheat. 1, of which Chancellor *Walworth* said, in *Potter v. Chapin*, 6 Paige, 639: "I believe it is generally admitted that the decision in *Baptist Association v. Hart* was wrong; and it may now be considered as an established principle of American law, that the Court of Chancery will sustain and protect such a gift, bequest, or dedication of property to public or charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift or dedication is specific, and capable of being carried into effect according to the intention of the donor."

¹⁶⁰ *American Bible Society v. Wetmore*, 17 Conn. 181; *Bull v. Bull*, 8 Conn. 47.

¹⁶¹ 6 Vesey, 404, 410.

¹⁶² *Wells, Ex'r, v. Doane*, 3 Gray, 201, 203, citing *Going v. Emery*, 16 Pick. 107; *Brown v. Kelsey*, 2 Cush. 243.

66. In *Baptist Association v. Smith*,¹⁶³ it is said that where the grantor has full power to convey, and the uses are charitable, a court of equity, before, at, and after the statute of 43 Elizabeth, ch. 4, will aid a defective conveyance to such uses. And in *Gass v. Wilhite*¹⁶⁴ it is also said, that although there be a want or defect in the cestuis que trustent, or a vagueness or indefiniteness in the object of the charity, yet as a charitable use it will not be invalidated, and the court will, under the cy pres doctrine, give it effect, as near the general intent as may be. In *McAuley v. Wil-*
 * 543 son,¹⁶⁵ * it is said "that the English doctrine of cy pres is

¹⁶³ 3 Pet. (S. C.) 484, 491.

¹⁶⁴ 2 Dana, 170.

¹⁶⁵ 1 Dev. Eq. 276. In *Holland v. Peck*, 2 Ired. Eq. 255, a devise to the Methodist Church in America, to be disposed of as they shall think best, for the spread of religion and the gospel, was held void, on account of the cestuis que trustent being so indefinite, there being no corporate organization to represent them, and no mode of reaching the persons intended to be benefited. And in *Bridges v. Pleasants*, 4 Ired. Eq. 26, a bequest to "foreign missions," "home missions," and "to the poor saints," to be applied as the executor may think best, according to the Scriptures, was held void, on the ground of indefiniteness. And a power of appointment given to one by will, to give or devise certain property among such "benevolent, religious, or charitable institutions as she may think proper," was held void, on the ground that it was so vague and indefinite that the court could not carry it into effect. *Norris v. Thomson*, 4 C. E. Green, 307. That might be so where the devisee or appointee should fail to make any appointment; but, after the appointment, many such trusts have been held valid. A bequest to trustees for such charities and other public purposes as lawfully might be in the parish of T. was held a valid charitable use. *Dolan v. Macdermot*, Law Rep. 5 Eq. 60; s. c. 3 Ch. App. 676. And the direction in a will that the executor shall invest the residue of the estate "as he may deem best, as a fund, the annual interest of which shall be applied for the benefit of the Sabbath-school Library of the First Baptist Church in S., or the Baptist Home Missionary Society, whichever he may deem most suitable," was held a good charitable bequest. *Fairbanks v. Lamson*, 99 Mass. 533. See also *Drury v. Natick*, 10 Allen, 169; *Saltonstall v. Sanders*, 11 Allen, 446. In these two cases the law of charitable trusts is very ably and very elaborately discussed by Mr. Justice Gray. In *Drury v. Natick* the bequest was of the residue of the estate, after payment of debts and funeral and other expenses to the town of Natick for creating a free public library, and, if sufficient, a free public reading-room; and it was held to create a charitable trust which the court will administer through the agency of the trustees provided in the will to be chosen by the inhabitants of the town. In *Saltonstall v. Sanders*, the bequest was "to the furtherance and promotion of the cause of piety and good morals, or in aid of objects and

not in force in that state. The validity of the devise depends on the question, * whether the devisees are accountable * 544

purposes of benevolence and charity, public or private, or temperance, or the education of deserving youth;" and the trustees had "full power, discretion, and authority to appropriate and expend said income or capital in such manner as in their judgment may best promote the objects above mentioned." The court, regarding the numerous alternatives in the bequest as giving a right of selection, considered that, if any of them were to be held charitable trusts, the bequest should be upheld and applied to that use. The court considered that "objects and purposes of benevolence and charity, public or private," was clearly charitable in the sense of the law, and construed it as intended for the general relief of the poor, either through public institutions, or by means of almsgiving, through the agency of individuals. There would seem little question that this was a charitable use; and the same is probably true of some of the others named in the quest: but perhaps this was the most unquestionable; and the court would naturally select that in regard to which there was no question, even where the object was less important than some of the others named. We should have entertained no question upon this latter point had it not been for the decision of an English equity judge, when applied to for the purpose of obtaining a direction how the accumulated income of a charity beyond what the scheme of the donor required, that the portion of the scheme in regard to gifts to the poor should not be enlarged, but the whole surplus applied to the other objects. His lordship said, in substance, that such provisions for the poor were always hurtful to the persons intended to be benefited; and his only regret was that he had not power to wholly withhold all application of the income in that direction. But as he had no power to abolish the scheme of the donor, or to restrict it, he would take care not to increase that portion of it which he regarded as hurtful. The Attorney-General *v. Marchant*, 12 Jur. N. S. 957; S. C. ante, N. 132. Vice-Chancellor *Kindersley* is here reported to have said, in giving judgment: "I only regret that I cannot take away what they at present have." But this expression is not found in the regular series of reports. Law Rep. 3 Eq. 424. See also *White v. Attorney-General*, 4 Ired. Eq. 19. But in most of the states a favorable course has been pursued in the construction of public and charitable trusts. In *Sewall v. Cargill*, 3 Shepl. 414, where land was given to Newcastle, "to the said inhabitants, their heirs and assigns for ever, to remain for a glebe or parsonage for ever," and some years afterwards the town was incorporated, and the land continued to be used for the purposes indicated in the will, it was held to be a valid and binding dedication of the same to public, pious, and charitable uses. And in *Inglis v. The Trustees of the Sailors' Snug Harbor*, 3 Pet. (U. S.) 99, this question is extensively discussed by different members of the court, and the early declarations of the court, in regard to the validity of charitable trusts of an indefinite character, considerably modified. The statute of Elizabeth is held to be in force in Maine; and the courts there manifest a favorable disposition to carry into effect charitable trusts, not so indefinite as to be unintelligible. *Tappan v. Deblois*,

to any one for the due execution of the trust. If not, it is void; and there is a resulting trust for the heir at law, or next of kin." The learned judge here refers to the question, whether or no there are any *cestuis que trustent* capable of such identification that they could, in their own person, call the trustees to account; but it does not seem to have occurred to him that this is the precise distinction between the degree of indefiniteness which will avoid an ordinary trust, and will not avoid a trust of a charitable character. But it will be perceived that this very distinction has not been always borne in mind in others of the American states which have professed to adopt the principles of the English law of charity, either with or without the statute of Elizabeth. Thus they have fallen into the rather marked inconsistency of professing to adopt the English law in regard to administering charitable trusts, and at the same time reject the very distinction between charitable and other trusts, upon which the entire superstructure of charity law in England is based. For if we do not recognize trusts for charity of a more indefinite character than ordinary trusts, so far as the identification of the *cestuis que trustent* are concerned, we subvert and expunge the entire chapter of English charity law in our courts and from our books. But most American cases recognize this distinction.

67. Thus, in New Hampshire, in a bequest to the "westerly part of Hopkinton," and upon condition that the inhabitants will settle a Congregational minister within three years from the death of the testator, it was held that no title passed to any particular legatee who could demand the legacy of the executor. But equity will compel the executor to pay the amount to any body of Christians in that portion of the town who might come fairly within the contemplation of the terms of the

* 545 will, as * construed by the light of admissible surrounding circumstances. But that not appearing to be true in regard

45 Me. 122; *Preachers' Aid Society v. Rich*, 45 Me. 552. So in *Hopkins v. Upshur*, 20 Texas, 89, it was held that equity has an inherent jurisdiction over trusts for charitable purposes, as building churches. And in *Chambers v. St. Louis*, 29 Mo. 543, the same rule is declared, and also that the statute of Elizabeth is in force in that state. That was a bequest to the city of St. Louis to constitute a fund for furnishing relief for all poor emigrants and travellers coming to that city on their way bona fide to settle in the West, and it was held a valid trust, to be administered by the city, subject to the control of a court of equity. But in Iowa the jurisdiction over charitable trusts is more limited. *Lepage v. McNamara*, 5 Clarke, 124.

to the claimants, and it being expressly declared in the will, that, if the condition of this bequest was not complied with, the same should go to an existing Congregational Society in the town, the court said, *Parker*, Ch. J., "Sitting as a court of equity by virtue of the general jurisdiction we have over gifts to charitable uses, if the charitable intention of the testator could not be carried into effect, we might, perhaps, apply the doctrine, technically called *cy pres*, and, to prevent a failure of the charity, direct the income of the fund to be applied to the use of some other Congregational Society in Hopkinton than that which the testator intended. . . . But this court have no jurisdiction to devise a new scheme for a charity, so long as that devised by the donor may take effect." ¹⁶⁶

68. In the State of New York, the statute prohibits the creating of trusts in real estate; and on that account a provision by the testator for the creation of a public dispensary for indigent persons was held void, so far as it implied the necessity of procuring a site and erecting a building for that purpose; and the effect of declaring this portion of the bequest void and illegal was to prevent any portion taking effect in such a way as to enable the court to determine the extent of any possible surplus, a gift of which, therefore, could not take effect.¹⁶⁷ It has been repeatedly de-

¹⁶⁶ *Second Cong. Society v. First Cong. Society*, 14 N. H. 315, 330.

¹⁶⁷ *Beekman v. People*, 27 Barb. 260. It is also held in this case, that where the testator bequeathed to his executors all the residue of his estate, to pay and apply the same in such sums, and at such time or times, as they should think fit, to one or more societies for the support of indigent respectable persons, "hereby intending to give to my executors full discretionary powers as to the disposition of the same, but so that the same shall be applied to objects of charity," that, the executors having renounced the trust, the court could not carry the intention of the testator into effect, and that the fund could not be decreed to the societies to be administered by them for the general object indicated in the will, the discretion of the executors being essential to carry out the purpose of the testator. This case was affirmed in the Court of Appeals, 23 N. Y. 298. It is here declared that a gift to charity, which is void at law for want of an ascertained beneficiary, will be upheld by the courts of this state, if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite. In other respects, charitable trusts are subject to the same rules as other trusts. The trust must be capable of execution by a judicial decree, in affirmance of the gift as the donor made it. The doctrine of *cy pres* has no existence in this state; but it would seem that a charitable gift,

* 546 cided in * New York, within the last few years, that real estate cannot be devoted to charity.¹⁶⁸

69. And in the last case it was held that a devise of real estate to the Right Reverend Bishop Hughes, in trust for the benefit of the Roman-Catholic Church in the State of New York, was so general a trust, that the courts will not undertake to apply it to allowable purposes, but declare it null and void. And a bequest for the purpose of founding a college in Liberia, to be applied by the executors as would in their judgment best effect the object, wishing them specially to have in view the establishment of a theological department in said college, to be under the supervision of the Union Theological Seminary in the city of New York, was held too indefinite to be maintained.¹⁶⁹

70. There was never any objection to the creation of perpetuities in regard to charitable trusts, it being of the essence of charity to make it perpetual. This subject is very learnedly discussed by *Denio, J.*, in a recent case¹⁷⁰ in New York. And the English courts have always maintained the same doctrine.¹⁷¹ And

when the sum was uncertain, the amount being left to the discretion of the executors, who have renounced the trust, is so defective, that it could not be administered upon the most extended construction of the English doctrine of *cy pres*. The doctrine of *cy pres* is said, in *Gilman v. Hamilton*, 16 Ill. 225, to extend only to carrying out the intention of the donor, and that the court have no authority to change the object or location of the charity, because it might thereby be rendered more efficient. The charity must be accepted upon the terms proposed, and cannot be modified by consent of the heirs of the donors, and of the trustees or donees. But it would seem that where there is no precise limitation in the devise, restricting the thing bequeathed to a charitable use to any precise form of application, and circumstances intervene, requiring a change of investment in order to render the gift effectual, there must reside in the courts of equity a discretion to so change the form of the investment as to prevent its entire destruction or substantial failure.

¹⁶⁸ *McCaughal v. Ryan*, 27 Barb. 376.

¹⁶⁹ *Phelps, Ex'r, v. Phelps*, 28 Barb. 121; s. c. nom. *Phelps v. Pond*, affirmed 23 N. Y. 69.

¹⁷⁰ *Williams v. Williams*, 4 Seld. 525.

¹⁷¹ *White v. White*, 7 Vesey, 423; *Isaac v. De Friez*, 17 Vesey, 373, n; *Attorney-General v. Price*, id. 371; *Tudor, Ch. Trusts*, 251. It has been decided in England, that a gift to repair a tomb for ever, not being a gift to charity, is not maintainable, on account of its perpetuity. *Lloyd v. Lloyd*, 2 Sim. N. s. 255; *Carne v. Long*, 6 Jur. N. s. 689; 8 W. R. 570. And, where funds were given to a friendly society which was not charitable, it was held inoperative, and that they reverted to the estate. *Clark's Trusts*, 24 W. R. 233.

this * question is examined at length and the decisions * 547 carefully reviewed by Mr. Justice *Gray* in a case in Massachusetts (*Odell v. Odell*),¹⁷² where the accumulation of a portion of the income of real estate was directed in a will for fifty years, and then to be applied to establish a charity, and it was held a valid bequest, even if the accumulation cannot be allowed for so long a period.

71. And at common law no fund was allowed to be accumulated beyond the limit allowed for the vesting of an executory devise, which is the period of a life or lives in existence at the decease of the testator, and twenty-one years and a fraction thereafter; thus allowing for the period of the minority of the devisee, treating infants during the entire period of gestation as in esse.¹⁷³

¹⁷² 10 Allen, 1.

¹⁷³ Tudor, 252. This additional fraction of a year allowed with reference to the minority of the devisee has been determined by the English courts to have reference only to such cases as where the devisee is, in fact, an infant, in ventre sa mère; and that in all other cases the period for vesting is limited to the duration of lives in existence, and twenty-one years. It was for a long time debated whether the period of twenty-one years could be added to the duration of the lives, except where the devisee was, in fact, an infant. But the matter is finally put at rest in England, by the decision of the House of Lords, in *Cadell v. Palmer*, 7 Bligh, 202, s. c. 10 Bing. 140, 1 Cl. & Fin. 372, where it was determined that the true limit against perpetuities was "a life or lives in being, and twenty-one years, without reference to the infancy of any person whatever." And upon the question, whether such term could be extended by the addition of the "number of months equal to the ordinary or longest period of gestation," the judges declared their unanimous opinion that such a limitation would be void, as too remote, they considering twenty-one years as the limit of accumulation, and the period of gestation to be allowed in those cases of devises only in which the gestation exists. 1 Jarman (ed. 1861), 228; post, § 37, pl. 3. And the fact that the vesting is not suspended by the intervention of a life or lives will make no difference in regard to the absolute term for which it may be suspended. If, therefore, without the intervention of a life or lives, the period of vesting is postponed more than twenty-one years, the devise will be void. *Palmer v. Holford*, 4 Russ. 403; *Speakman v. Speakman*, 8 Hare, 180. The same difficulty does not exist in regard to remainders contingent upon intervening estates as to possible remoteness, which has already been adverted to in regard to executory devises. 1 Jarman, 234 et seq. The doctrines of the English courts in regard to the term of the limitation of an executory devise have been adopted in the American states. In *Church in Brattle Square v. Grant*, 3 Gray, 142, Chief Justice *Bigelow* examined the cases, English and American, very much at length, and gave a learned and thorough analysis of the principles involved in

* 548 And * where a gift to charity is made with an indefinite direction for accumulation until it meet a prescribed amount, which must extend beyond the limit allowed by law, the court will declare the bequest, to the general object named in the will, good, but the direction for accumulation not maintainable.¹⁷⁴ In the last case the Vice-Chancellor said, as the particular mode in which the testator intended the benefits to be doled out to the objects of his bounty could not take effect, yet, as there is confessedly a devotion of his personal estate to charity, the next of kin have no claim upon the property, and the charitable intention should be carried into effect through the medium of some other scheme. And in giving direction to the Master in regard to settling the scheme, he was required to have regard to the objects specified in the will. This is substantially in accordance with the rule adopted in some of the American states where the question has arisen. In *Williams v. Williams*,¹⁷⁵ it was held that where a legacy is given to a religious corporation for a purpose authorized by law, but with a direction that it be accumulated beyond the limit allowed by law before the income shall be expended, the direction only is void, and the legacy is not defeated.

72. It seems to be well settled in the English Chancery, as before stated, where a bequest is made to charity, generally, however commendable the purpose, if no trustees are appointed by the donor for carrying the same into effect, and there is no means pointed out whereby the cestuis que trustent may be ascertained, that it cannot be administered by the Court of Chancery, but falls within the special jurisdiction of the crown, as *parens patriæ*, who is thereby standing trustee to execute all such indefinite charities, which he will do through the instrumen-

the questions arising in that case. It is there held, that, where the executory devise *may* vest beyond the term already named, it is void for remoteness. But the failure of the devise over for remoteness will not affect the intermediate estate. Ante, § 17, pl. 30.

¹⁷⁴ *Martin v. Margham*, 14 Sim. 230.

¹⁷⁵ 4 Seld. 525. And the same doctrine is reaffirmed in the recent case of *Phelps v. Pond*, 23 N. Y. 69. Tudor, Ch. Trusts, 224. See also *Kilpatrick v. Johnson*, 15 N. Y. 322. In the latter case it was held, that a void trust for accumulation does not invalidate the bequest of the principal, unless it involves an illegal suspension of the absolute ownership. The direction only is void, and the income goes to those next presumptively entitled to the principal.

talities of * the Chancellor, as special commissioner of the * 549 crown for that purpose under the sign-manual or privy seal.¹⁷⁶ Mr. *Boyle*, in his treatise on charitable uses,¹⁷⁷ says: "It may therefore be considered, that however vague and indefinite the gift may be, provided it is strictly charitable in its nature, and not mixed up with general purposes, the disposition will be carried into effect, *cy pres*, either by the court or the crown, according as there has or has not been an interposition of trustees."

73. And it is a general rule, in regard to trusts not charitable, and some courts extend it to all trusts, that the Court of Chancery will not appoint trustees for the purpose of carrying into effect a general and undefinable purpose of the testator, where no such trustees have been appointed by him, and his intent has been so imperfectly expressed as to leave it to be gathered from mere conjecture; or where they have been left to be determined by trustees named by the testator, and such trustees have declined to act, or deceased before the testator.¹⁷⁸ In one case, in New York, it is expressly declared, that where there is no trustee named by the donor, competent to take, the Court of Chancery in that state, where the common-law power and jurisdiction over charities is held to exist in full vigor, has no jurisdiction to uphold a bequest for a charitable or religious purpose.¹⁷⁹ But we apprehend

¹⁷⁶ Ante, pl. 42, and cases cited; Boyle on Charities, 237; *Moggridge v. Thackwell*, 7 Vesey, 83, 86. Lord *Eldon* here says: "I have conversed with many persons upon it. I have great difficulty in my own mind, and have found great difficulty in the mind of every person I have consulted; but the general principle thought most reconcilable to the cases is, that where there is a general indefinite purpose, not fixing itself upon any object . . . the disposition is in the king, by sign-manual; but where the execution is to be by a trustee, with general or some objects pointed out, there the court will take the administration of the trust." See also *Paice v. Archbishop of Canterbury*, 14 Vesey, 372; Boyle, 241; *Attorney-General v. Syderfen*, 1 Vern. 224.

¹⁷⁷ Boyle, Law of Charities, 241.

¹⁷⁸ Hill on Trustees, 176, 212; *Beekman v. Bonsor*, 23 N. Y. 298.

¹⁷⁹ *Owens v. The Missionary Society of M. E. Church*, 4 Kern. 380. The objects of the society here in question were, by its constitution, declared to be "to diffuse more generally the blessings of education, civilization, and Christianity throughout the United States and elsewhere." But not being incorporated, it was considered by the court that they could not act as trustees for the purpose of carrying the use into effect. The decision takes a narrower view of the powers of a court of equity than seems altogether consistent with

* 550 that * this rule only extends to that class of charitable bequests where the objects are entirely indefinite, or else depend upon the arbitrary discretion of the trustee. It was accordingly held, in a recent case in the State of Maine,¹⁸⁰ that, if the object of a charitable trust can be ascertained, the want of a trustee to execute the trust will be supplied by an appointment by the court.

74. The very singular charity established or defined by the will of Stephen Girard of Philadelphia has led to numerous suits and controversies in the courts of equity, both of the state and of the nation. And it is regarded by many, at the present day, as questionable, whether such a scheme as that defined by this founder ought ever to have received the countenance of the courts.¹⁸¹

the general history of its administration of charities, both in England and America. The authorities which were cited in argument to establish the proposition that an indefinite charitable gift is void, where there is no trustee to carry it into effect, were, *Attorney-General v. Hickman*, 2 Eq. Cas. Ab. 193, *Charity (A)*, pl. 14; 1 *Jarman on Wills* (Perk. ed.), 196; *Williams v. Kershaw*, 5 Cl. & Fin. 111. But it will be evident that those authorities which are cited by Mr. Noyes (23 N. Y. 638), and which the court seem to regard as applicable, were not decided on the ground that the trusts were charitable, but the latter case; and the suggestions of Mr. Jarman go expressly upon the ground that the bequests were for such charitable and *other* objects as the trustees should deem most useful, which places them precisely upon the ground of trusts not charitable, which have always been held void for uncertainty. Post, pl. 80, and cases cited.

¹⁸⁰ *Preachers' Aid Society v. Rich*, 45 Me. 552. The same point is so decided in *Chapin v. School District*, 35 N. H. 445. And courts will even change trustees to carry into effect their own decree for executing a charity *cy pres*, where the one named in the will becomes contumacious. *Attorney-General v. Garrison*, 101 Mass. 223.

¹⁸¹ The slightest examination of the mode of training at the Girard College, where every thing is attempted to be carried forward in strict accordance with the statutes of the founder, will convince any one of the absurdity of attempting to train children without giving them religious impressions. The religious exercises there are conducted exclusively by laymen; but they are not on that account any the less impressive in their influence upon the pupils. A few years since, in being permitted to attend the chapel exercises of that school, we were impressed with the favorable contrast they exhibited in comparison with those of other boys' schools of the same grade. If what we saw there in 1856 is any fair sample of the religious training of the college, it will be found, that, in attempting to exclude all religious impressions from the minds of the pupils, the founder has only afforded another illustration of the modes by which an all-wise Providence is constantly baffling the

But * we make no question in that respect. In this free * 551 country, where religious toleration is carried almost to the extreme of patronizing positive licentiousness in religion, it would be wonderful that so well-meant a charity as an orphans' college (for the city of Philadelphia first, and ultimately for the whole state) should not have received the countenance of the courts of justice, on account of some of the morbid eccentricities of the founder, in excluding from the grounds for ever all religious teachers and ecclesiastics of every class and denomination, in order that an opportunity (as he, in his short-sighted and inexperienced conceit, fancied) might be afforded those orphan children for perfect freedom, when they arrived at years of maturity, in choosing their own religion; which, to a wise and philosophic observer and careful student of the history of the race, was little less absurd than to give his pupils the same freedom in selecting their own language,¹⁸¹ after they came of age to judge for themselves!

75. It has been held that this charity, which was limited to white male orphans, a preference being given to such as were born within the limits of the city of Philadelphia, extended to

narrow views and short-sighted purposes of mortals. For what Mr. Girard did, in his simplicity, for the religious freedom of his beneficiaries, and which, if it could have succeeded, would have been their ruin both for time and eternity, so far excited the jealousies of the outer world as to impose a greater vigilance upon his lay trustees not to allow this restriction to work the apprehended detriment; and this, in fact, instead of leaving the minds of the pupils a mere *tabula rasa*, as the founder desired, and which was in fact wholly impracticable, short of reducing them to absolute heathenism, or something worse, was the very thing to secure a more careful religious training. We feel bound to say that the Girard College, as far as we know, is the only college in the United States where the pupils absolutely kneel in prayers, and do this *bona fide*, and without any sham whatever. This may be esteemed a remarkable place to introduce such a statement. But we desire to do it for two reasons, — to vindicate that particular charity from an unmerited reproach, to which we believe it is subjected, in the minds of almost all religious people; and at the same time to testify our entire want of confidence, as a means of restraint upon youth, in the religious exercises which we have witnessed or heard of in American public schools. These exercises are most ostentatiously paraded before the public, as being of a most salutary and restraining character; and at the same time they are in fact so managed in the majority of cases, we fear, at the present day, as practically to inculcate positive irreverence and blasphemy upon the minds of too many of the pupils.

such children as had lost a father ; and the provision extending a preference to those born in the city* of Philadelphia was meant to extend no further than to the city as laid out by William Penn.¹⁸²

* 552 * 76. By force of the United States Constitution prohibiting the states from passing any law impairing the obligation of contracts, educational and other charitable corporations have been held to have acquired certain vested rights in regard to the control and appropriation of their funds, not subject to be affected by subsequent legislation. A grant of corporate franchises to those bodies, with funds for the accomplishment of the general purpose of such incorporations, has been held to create a contract between the state and the founder, which is thus rendered inviolable. The leading case in this country upon the vested and inviolable character of corporate rights is that of *Dartmouth College v. Woodward*,¹⁸³ and is the one upon which the entire superstructure of vested rights in this country is mainly built. The same principle has been recognized and extended to all private corporations throughout the different states, as well civil as eleemosynary. It would answer no good purpose to refer to those cases in detail here : they will be found carefully digested in another place, to which we must refer.¹⁸⁴

77. Chancellor *Kent*, in the latest edition of his Commentaries, which received his personal supervision,¹⁸⁵ left the following summary as his final testimony in regard to the law of Charitable Uses both in England and in this country : “ The doctrine of the English Court of Chancery is much broader than any that has been inculcated in America. If a bequest be for charity, it matters not how uncertain the objects or persons may be, or whether the bequest can be carried into exact execution or not ; or whether the persons who are to take be in esse or not ; or whether the legatee

¹⁸² *Soohan v. Philadelphia*, 33 Penn. St. 9 ; s. c. 1. Grant's Cases, 494. But in *Girard's Heirs v. Philadelphia*, 7 Wallace (U. S.), 1, it was considered that the enlargement of the area of the city or the increase of the number of the corporators ; or even the change of the corporate name, would not so affect its identity as to impair its capacity to administer the charity. Ante, n. 140.

¹⁸³ 4 Wheaton, 518.

¹⁸⁴ 2 Redfield on Railways, 4th ed. ch. 32, § 232, pp. 423-439. See also *St. John's College v. The State*, 15 Md. 330.

¹⁸⁵ 4 Kent, Comm. 508, and note.

be a corporation capable in law to take or not. In all these and the like cases, the court will sustain the legacy, and give it effect according to its own principles. Where a literal execution becomes inexpedient or impracticable, the court will execute it *cy pres*. The crown has a right to interfere where a charitable object fails, and it must signify in chancery the charitable purpose the fund shall be applied to.”¹⁸⁶

* 78. “The conclusion upon the authorities in England * 553 drawn by Lord *Eldon* is, that, where there is a *bequest to trustees for charitable purposes*, the disposition must be in chancery, under a scheme to be approved by the Master; but where the object is charity, *and no trust is interposed*, it must be by the king under his sign-manual; for in such cases the king, as *parens patriæ*, is deemed the constitutional trustee.”¹⁸⁷ But, “in this country, the legislature or government of the state, as *parens patriæ*, has the right to enforce all charities of a public nature by virtue of its general superintending authority over the public interests, where no other person is intrusted with it. The jurisdiction vested by the statute of Elizabeth over charitable uses is said to be *per-*

¹⁸⁶ *Simon v. Barber*, Taml. 14; *Attorney-General v. Andrew*, 3 Vesey, 633; *Attorney-General v. Bowyer*, 3 Vesey, 714; *Moggridge v. Thackwell*, 7 Vesey, 36; *Mills v. Farmer*, 1 Mer. 55; *Bennett v. Hayter*, 2 Beav. 81; *Attorney-General v. The Ironmongers' Company*, 2 Beav. 313; the case of *The Trustees of the Baptist Association v. Smith*, 3 Pet. (U. S.) App. 484. In the case of *Newmarket v. Smart*, 4 Am. Law Reg. N. S. 390, not yet reported in the regular series of New Hampshire Reports, Mr. Justice *Bellows*, in discussing the question of grants and devises for charitable uses, uses the following language: “Grants and dedications to public and religious uses form an exception to the general rule applicable to private grants: . . . the grant may take effect, although there be no grantee in esse.” In the course of a very satisfactory elucidation of the point, the learned judge cites *Pawlet v. Clark*, 9 Cranch, 292; *Beatty v. Kurtz*, 2 Pet. (U. S.) 566; *Cincinnati v. White's Lessees*, 6 Pet. (U. S.) 431. In *Sinnett v. Herbert*, L. R. 7 Ch. App. 232, Lord Chancellor *Hatherley* held that a bequest to build or endow a church in a particular place was not in conflict with the statute against mortmain; but, as it was entirely indefinite in regard to the time of its execution, it was doubtful whether the court would retain it indefinitely, or apply *cy pres*. And in *King v. Tunstall*, L. R. 6 P. C. 55, it is held no objection to a bequest for charity that it is made to temporary trustees, to hold until a corporation shall be legally put in operation for the permanent management of the fund, there being no statute against it.

¹⁸⁷ *Moggridge v. Thackwell*, 7 Vesey, 36.

sonally in the Chancellor, and does not belong to his ordinary or extraordinary jurisdiction in chancery.”¹⁸⁸

79. The rule is thus stated, so far as the American courts are concerned, in the latest edition of Mr. Justice Story’s *Equity Jurisprudence*:¹⁸⁹ “There was a jurisdiction in chancery over charitable trusts antecedent to the statute of Elizabeth; and that although the statute was never in force in Pennsylvania, yet that the common law of that state had always recognized the chancery jurisdiction in cases of charities.”¹⁹⁰ “The same rule is now recognized in most of the American states; and courts of equity, in most of them, take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if sufficiently certain to be intelligible, and without regard * 554 to the * existence of a trustee capable of holding the legal estate. In some of the states this is done upon the theory of the common-law jurisdiction of courts of equity over the subject; and in others, upon the ground that the provisions of the statute of 43 Elizabeth have been adopted, as a portion of the common law, in those states.”¹⁹¹ If there is no legal trustee, the court of equity will compel the heir to act as such until another be appointed by the court.”¹⁹²

80. So that we think it safe to refer all those cases which have been held to create trusts, of too indefinite a character to be enforced by a court of equity, to the general subject of trusts; and upon examination it will be found, we think, so far certainly as the decisions of the English courts go, that although these cases have been claimed, by the parties interested to support them, to be of the nature of charitable trusts, they either did not come within the equitable construction of the statute of Elizabeth, which now

¹⁸⁸ Lord *Hardwicke*, in *Corporation of Burford v. Lenthall*, 2 Atk. 553; *Story*, J., in *Baptist Association v. Smith*, 3 Pet. (U. S.) 484.

¹⁸⁹ § 1154 c; *Vidal v. Girard’s Executors*, 2 How. (U. S.) 127.

¹⁹⁰ § 1154 d.

¹⁹¹ *Going v. Emery*, 16 Pick. 107; *Burbank v. Whitney*, 24 Pick. 146; *Executors of Burr v. Smith*, 7 Verm. 241; 1 *Jarman on Wills*, 242, and the learned note of Judge *Perkins* (ed. 1859), where the cases and authorities are extensively cited, and thoroughly reviewed and analyzed.

¹⁹² *Bartlett v. Nye*, 4 Met. 378; *M’Cartee v. Orphan Asylum Society*, 9 Cowen, 437, 484; *Opinion of Chancellor Jones in Potter v. Chapin*, 6 Paige, 639, 650.

forms the basis of equity jurisdiction in regard to charities in England, or, if they did embrace subjects within that statute, they also extended, either absolutely or in the discretion of the trustee, to other matters not within the statute; and so the bequests were really declared void for uncertainty, because they were not *exclusively* charitable trusts. As is said by Mr. Justice Story:¹⁹³ "Since the statute of Elizabeth, the Court of Chancery will not establish any trust for *indefinite purposes of a benevolent nature, not charitable within the purview of that statute*, although there is an existing trustee in whom it is vested; but it will declare the trust void, and distribute the property among the next of kin."¹⁹⁴

* 81. The rule as to uncertainty, both in regard to the * 555 beneficiaries and the mode of carrying the bequest into effect, received a very liberal construction in a late case in Connecticut,¹⁹⁵ where the beneficiaries were to be selected by the

¹⁹³ 2 Eq. Jur. § 1158.

¹⁹⁴ *Vezey v. Jamson*, 1 Sim. & Stu. 69. This was a bequest to such charitable or *public purpose or purposes, person or persons*, as the trustees should in their discretion think fit; and it was held void, because it was not limited to charitable objects, but might be disposed of in any manner the trustees saw fit, consistent with the laws of the land, which might carry it very wide of any object embraced within the limits of the legal definition of charity. So a bequest for such benevolent, religious, and charitable objects as the trustees should in their discretion think most beneficial, was held void upon similar grounds. *Williams v. Kershaw*, cited 1 Keen, 232. But a bequest, limited to such religious and charitable uses as the trustees should think proper, was upheld as being exclusively charitable in its character. *Baker v. Sutton*, 1 Keen, 224, 232, 233. And a bequest of a fund to executors, to apply to such charitable and *other* purposes as they should think fit, was held void upon the same ground already stated. *Ellis v. Selby*, 1 My. & Cr. 286, 298, 299. So, too, where the income was to be applied "according to a statement appended," and no such statement could be found, it was held that the trustees could not hold the bequest beneficially, and the court could not presume a charitable object in the bequest; and, if not charitable, the object was too indefinite to allow the gift to be upheld. *Aston v. Wood*, Law Rep. 6 Eq. 419. We have thus, at the expense of some apparent repetition in bringing up the same cases in different points of view, given a careful summary of the existing charity law, both in England and America.

¹⁹⁵ *Treat's Appeal*, 30 Conn. 113. The law in this state is here declared by *Ellsworth, J.*, to require "certainty in the persons to be benefited; and an ascertained mode of selecting them, if they are to be taken from a definite class." *White v. Fiske*, 22 Conn. 31, 53. The subject is further discussed

trustees, with a very broad and almost unlimited discretion. But it is evident that no such distinction between charitable and other trusts is recognized in this state as that which exists in England and in many of the other states.

82. The question of what is requisite to constitute a charitable use has been considerably discussed in some modern cases * 556 in * Massachusetts.¹⁹⁶ And it is here settled, in conformity

in *Proprietors, &c. v. Post*, 31 Conn. 240. There was a statute of this state passed in Provincial times, 1702, which recognized gifts for the support of the ministry of the gospel, and for other public or charitable uses, and which exempted lands so held from the payment of taxes; and upon the extent of this exemption many decisions have turned. *Brainard v. Colchester*, 31 Conn. 407, and cases cited. A devise of land to a town in this state, directing the interest to be expended annually in the repair of highways and bridges, was held a valid charitable use. *Hamden v. Rice*, 24 Conn. 350. So also, in England, where the bequest is to found a school for the education of gentlemen's sons in a particular house built by the founder, and providing if the fund was not so expended it should be applied, in the discretion of the trustees, to some other object for the good of the district, and the title of the house failed, the court referred it to the Master to settle a scheme in accordance with the alternative in the will. *Attorney-General v. Ld. Lonsdale*, 1 Sim. 105.

¹⁹⁶ *Shaw*, Ch. J., in *Attorney-General v. Federal-street Meeting-House*, 3 Gray, 1; *Same v. Merrimack Manufacturing Co.*, 14 Gray, 586. In this latter case the matter is thus clearly and succinctly stated by Mr. Justice *Hoar*: "There must be some strictly public object of bounty, or such indefiniteness in the designation of those who are beneficially interested, that no persons competent to sue can claim a direct interest in themselves to authorize a proceeding by information in the name of the Attorney-General to enforce the due administration of the charity. . . . Whatever else may be essential to constitute a dedication of land to pious uses, the mere appropriation of it by its owner to the uses of a church, or of public worship, in the sense in which that phrase is usually understood, is not sufficient." See also *Dexter v. Gardner*, 7 Allen, 243, where a bequest, the income of which is to be appropriated for the benefit of the Friends' Meeting, in a particular place, in perpetuity, without any further designation of the purposes to which it is to be applied, is held to be a public charity, and therefore not void, as a perpetuity, if it be proved that all the purposes to which the Friends apply their funds, under their usages and discipline, are the maintenance of religious worship and of schools, aiding the sick and the poor, and maintaining burial-places, the latter being regarded by them as a religious duty. It is here said by Mr. Justice *Chapman*, "Since the decision of *Earle v. Wood*, 8 Cush. 430, it must be considered as settled that the statute 43 Eliz., c. 4, is a part of our common law, and that a trust for the use of a well-known religious community is valid, though . . . not incorporated."

with the English rule upon this and analogous subjects, that reasonable costs of all parties, as between attorney and client, will be allowed out of the fund, where such parties are properly before the court, and the questions involved are really doubtful.¹⁹⁷ If a legacy for a charitable purpose is given to an association incapable of undertaking the trust, the court will appoint a trustee to receive the legacy and apply it to the prescribed objects.¹⁹⁸

83. We have said nothing in regard to the effect of the statutes of limitation, and lapse of time, in barring charitable trusts, because, strictly speaking, they have no effect in that direction. It has been long settled that trusts, and especially charitable trusts, do not come within the operation of the ordinary statutes of limitation.¹⁹⁹

84. But there can be no doubt that lapse of time is often an essential element in disposing of charity suits. Thus where a trust had been administered for more than a hundred years, without any question as to the right or manner of its administration, * it was held that it ought not to be disturbed, without * 557 clear and unequivocal evidence that the true terms of the trust have been disregarded, and that the just and legal rights of the party complaining have been infringed.²⁰⁰

85. The effect of lapse of time in the construction of public charities is fairly stated, perhaps, by Lord Justice *Turner*, in *Attorney-General v. The Corporation of Rochester*:²⁰¹ “Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument, the court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a time applied. But that is the case where the

¹⁹⁷ *Bliss v. The American Bible Society*, 2 Allen, 334; ante, pt. 1, § 36.

¹⁹⁸ *Ibid.*

¹⁹⁹ 2 Story, Eq. Jur. § 1520 b et seq., and cases cited. But see *Cadbury v. Smith*, L. R. 9 Eq. 37, as showing the statute may sometimes operate.

²⁰⁰ *Attorney-General v. Reformed Protestant Dutch Church*, 33 Barb. 303. See *Attorney-General v. St. John's Hospital*, 11 Jur. n. s. 629.

²⁰¹ 5 DeG., M. & G. 797, 822. See also *Attorney-General v. Sidney Sussex College*, L. R. 4 Ch. App. 722.

trust is doubtful in its terms and interpretation. If the court finds a clear trust expressed in a will, no length of time during which there has been a deviation from it can warrant this court, as I apprehend, in making a decree in contradiction to such a trust." And the same learned judge said, in *Attorney-General v. Corporation of Beverley*:²⁰² "If the court clearly sees what the intention of the testator was, and that there has been a breach of trust in the non-observance of that intention, I apprehend that no argument founded on the length of time can prevail."

86. And in *Attorney-General v. Federal-street Meeting-House*,²⁰³ it was held, that even in the case of trusts, such as the gift of property to maintain public worship in a particular form, they might be terminated by the unanimous consent of the cestuis que trustent; and that, where a claim had been set up and maintained adversely to the trust for forty years, it would create an effectual bar against any claim to revive and reinstate the trust. And Lord *Eldon* says, in *Attorney-General v. The Mayor of Bristol*,²⁰⁴ that, although a charity is not barred by the statute of limitations, an adverse enjoyment for a long time is a very material consideration in construing an instrument under which the claim is made.

And where complaints are made against the conduct of * 558 * trustees, at such a length of time as to render it difficult to make such defence as they otherwise might have done, the inquiry will not be enforced.²⁰⁵ In *re Chertsey Market*,²⁰⁶ the fact that the company had enjoyed the surplus of the funds arising from a charity for a long time, with the general acquiescence of those interested, was held to be sufficient ground for confirming such use.

87. In *Attorney-General v. Catherine Hall*,²⁰⁷ Lord *Eldon* said, that where estates had been given to different colleges in Oxford, charged with the payment of certain sums to the fellows, which these colleges had paid, "and the surplus has been enjoyed according to usage, for a long course of years, which may be taken as evidence of the terms on which they were accepted," the court ought, before it changes this usage, to be "perfectly sure" such was the intention of the testator. And in *Mayor of South Molton*

²⁰² 6 DeG., M. & G. 256, 268.

²⁰⁴ 2 Jac. & W. 321.

²⁰⁶ 6 Price, 261, 285.

²⁰³ 3 Gray, 1.

²⁰⁵ Shelford, 498.

²⁰⁷ Jacob, 381.

v. Attorney-General,²⁰⁸ Lord *St. Leonards* said: "I think that this is one of those cases that ought not to be encouraged. Here is a case in which, after a century and a half, there has been an attempt to disturb an arrangement which nobody ever thought of impeaching before. There has been plenty of opportunity of doing it. . . . I do trust that this will be the last case in which an attempt will be made to unsettle any of these ancient charities." And the same view is taken upon this point of the force of usage for a long period, in showing the true import and proper construction of the instrument of donation, by Lord *Cranworth*, in *Attorney-General v. Dean and Canons of Windsor*:²⁰⁹ "I feel that such a continued usage is not to be overlooked, when we are trying to discover what was the intention of those who founded the charity."

88. And in *Attorney-General v. Skinners' Co.*,²¹⁰ the Vice-Chancellor, *Shadwell*, said, where the company, during the lifetime of the donor, and for a long time afterwards, applied the surplus income of a charitable fund to their own use, "I have the sanction of Lord *Eldon* in saying, that long enjoyment ought to protect this body in the possession of that which it has held uninterruptedly; and also of Lord *Holt*, who was of opinion, * that, even where the matter is obscure, long enjoyment * 559 without interruption is great evidence of a right." And Lord *Brougham* adopted the same view of the question, when the same was before the House of Lords.

89. And in *Attorney-General v. Coventry*²¹¹ it was said, there is "no statute of limitation against God and religion. . . . And although charity is not barred by length of time or any statute of limitations, yet it is an evidence that the surplus belonged to Coventry." And by the English statute,²¹² the Attorney-General is barred from interfering in the administration of a charity after twenty years' acquiescence.²¹³ It seems to have been the practice of the English courts, so far as we can learn, without a single exception, to hold long acquiescence in a particular construction of

²⁰⁸ 27 Eng. L. & Eq. 17, 34.

²⁰⁹ 6 Jur. n. s. 833, 843.

²¹⁰ 5 Sim. 596; *Attorney-General v. Brazen-Nose College*, 2 Cl. & Fin. 295.
See also *Yordley v. Holland*, L. R. 20 Eq. 428.

²¹¹ 2 Vern. 397.

²¹² 3 & 4 Wm. IV. ch. 27.

²¹³ *Attorney-General v. Payne*, 27 Beav. 168.

a devise to charity, and enjoyment under such construction, conclusive of the right to continue the same.

90. Long-continued use in the application of a religious charity will have great weight in giving construction to doubtful terms in the instrument of donation.²¹⁴

91. Where the trustees appointed to administer funds devoted to charitable uses, for any reason are not subject to the control of the court, as where they have removed into a foreign jurisdiction, or a change in the extent of the jurisdiction of the court has for any reason occurred, it will be regarded as sufficient ground for changing the trustees.²¹⁵ But it seems to be no objection to the court administering funds devoted to charitable uses, that those uses are to be performed in a foreign jurisdiction.²¹⁶

92. Charitable trusts which embrace property in different states, where the trusts are declared void by the courts in the place of the domicile of the testator where the bulk of the property is situated, cannot be upheld in another state where some real estate lies, even though this real estate forms an essential and indispensable portion of the trust, and the trustees in the latter state were not made parties to the suit in the other state. The trust is entire, and cannot be enforced in part only.²¹⁷

²¹⁴ Dublin Case, 38 N. H. 459.

²¹⁵ Attorney-General v. College of William and Mary, 1 Ves. Jr. 243.

²¹⁶ 2 Story, Eq. Jur. §§ 1170, 1184, 1190. But where a legacy was to be applied to charity in Edinburgh, a court of equity in England will not order the distribution of it. *Edinburgh v. Aubery*, Amb. 236.

²¹⁷ Commonwealth v. Levy, 23 Grattan, 21.

* CHAPTER VI.

* 560

FOR WHAT PERIOD INCOME MAY BE ACCUMULATED.

1. Accumulation allowed for the same term as an executory devise may be deferred.
2. The history of the occasion of passing the Thellusson Act, 39 & 40 Geo. III. c. 98.
3. The term of twenty-one years after the death of the settler, how reckoned.
4. Trusts for accumulation beyond the allowed term void before the statute; but since, only for the excess.
5. The rule under the statute as to debts and portions which are excepted.
6. The destination of the income thus released from accumulation.
 - (1.) Where there is a present gift, it remains as if no direction for accumulation were made.
 - (2.) Avoiding the accumulation does not hasten the vesting of the estate.
 - (3.) Residue directed to be accumulated, the income will go to the heir or next of kin.
 - (4.) The income of accumulations follows the same rule as the income of the fund.
7. The rule against accumulations applies to implied as well as express directions.
8. The payment of premiums of life policies does not necessarily amount to accumulation.
9. This species of investment is more obnoxious to the charge of gambling, perhaps.
10. The rule adopted by the courts in New York under their statute.
11. Valid trusts not defeated by invalid ones, unless they are inseparable.
12. The estate of a lunatic may be accumulated without violating the statute.
13. Where the accumulation directed is illegal, bequest takes effect without it.
14. In Pennsylvania, devises in trust for accumulation beyond the time allowed, void in toto.

§ 37. 1. It seems to have been an acknowledged rule of law, from the earliest times, in England, that the income of an estate might be accumulated so long as the vesting of an estate might be deferred by an executory devise.¹ This was not found embarrassing in practice until the case of Mr. Thellusson's will.²

2. The testator in this case, having availed himself of the full license of the rule by which he was enabled to lock up his large estate from all enjoyment by those entitled to inherit it, during

¹ Ante, § 17, pl. 30; § 36, pl. 71, n. 172.

² *Thellusson v. Woodford*, 4 Vesey, 227.

* 561 * the entire period of lives in being at his decease, and for twenty-one years more, thus accumulating a most princely fortune for those in or for whom, in the nature of things, he could not have the remotest personal interest or affection, and whose sole prevailing motive for so absurd an act must therefore have been the mere gratification afforded by the indulgence of his own strange conceit, seemed to have presented the just occasion for restraining the period of remoteness for accumulation of income within narrower limits.³

3. The twenty-one years under the statute or at common law is to be computed exclusive of the day of the death of the testator.⁴ And even where the accumulation does not begin until many years after the death of the testator, it must cease at the period of twenty-one years from his death.⁵ And the settlor cannot direct an accumulation both for twenty-one years and the period of the minority of the person entitled;⁶ and if this is done, it will be good only for the former term.⁶

³ Statute 39 & 40 Geo. III. ch. 98. This statute, commonly known as the Thellusson Act, restricts the term for accumulation to the life or lives of the grantor or grantors, settlor or settlors, and the term of twenty-one years after such death, or during the minority of such person or persons as would otherwise be entitled under the will. The statute, in terms, renders any *direction* for a longer accumulation void, with an exception of funds provided for the payment of debts, and portions for children.

⁴ *Gorst v. Lowndes*, 11 Sim. 434, citing numerous earlier cases; *Toder v. Sansam*, 1 Br. P. C. 468; *Lester v. Garland*, 15 Vesey, 248, and other cases.

⁵ *Attorney-General v. Poulden*, 3 Hare, 555; *Shaw v. Rhodes*, 1 My. & Cr. 135, 154; *Webb v. Webb*, 2 Beav. 493; *Nettleton v. Stephenson*, 3 DeG. & S. 366.

⁶ *Wilson v. Wilson*, 1 Sim. n. s. 288; *Rosslyn's Trust*, 16 Sim. 391; *Ellis v. Maxwell*, 3 Beav. 587, 595. The cases which have been decided upon the construction of the particular provisions of the English statute need not be here discussed, unless they apply to the rule as it existed at common law, and which prevails generally in the American states. See *Haley v. Bannister*, 4 Madd. 275, *Ellis v. Maxwell*, 3 Beav. 587, 596, and the cases there cited, upon the point, whether the Thellusson Act allows accumulation during the minority of a child en ventre sa mère at the death of the testator, which seem to hold that the statute does not allow this period for accumulation in the case of such as are so situated at the death of the testator, which at common law was clearly allowed. A limitation for the lives of the deviser's children and for the lives of their children then unborn is void as to the latter provision, and will only be upheld for the lives then in being. *Hayes v. Hayes*, 4 Russ. 311. So also a trust by deed, creating an estate tail, to raise a sum of money for the persons next in course of limitation, was held void. Main-

* 4. It has been held under the Thellusson Act, that * 562 directions for accumulation beyond the term allowed are good for that portion of the time coming within the statute, and only void for the remainder.⁷ But it seems to be settled, that, as the law stood before the act, the trust for accumulation was void in toto, and the estate vested in the same manner as if the entire direction in regard to accumulation had been omitted.⁸

5. Under the Thellusson Act, the exception for payment of debts only extends to the debts of the testator; and that in regard to leasing portions for children does not allow the testator to add income to principal, and thus hand it over at some remote period in mass, so as virtually to produce the very evils which the act was intended to prevent.⁹

6. The destination of the income thus released from accumulation

waring *v.* Baxter, 5 Vesey, 458. See also *Porter v. Fox*, 6 Sim. 485; *Welsh v. Foster*, 12 Mass. 93, 97, by *Jackson, J.* *Amory v. Lord*, 5 Seld. 403.

But where the estates vest at the death of the settlor, or are limited to lives then in being, they will not be too remote. *Murray v. Addenbrook*, 4 Russ. 407. And a power of sale is not void, although its exercise is not expressly limited to the legal tenor of vesting executory estates. *Biddle v. Perkins*, 4 Sim. 135.

The laws against perpetuities are recognized in Georgia. *Smith v. Dunwoody*, 19 Ga. 237. A bequest over, after an indefinite failure of male heirs, is void for remoteness. *Conklin v. Conklin*, 3 Sandf. Ch. 64. See also *Lady Lanesborough v. Fox*, Cas. t. Talbot, 262; *Bennett v. Lowe*, 5 Moo. & Pay. 485; *Brashear v. Maccy*, 3 J. J. Marsh. 89; *Adams v. Chaplin*, 1 Hill, Ch. 265; *Allen v. Parham*, 5 Munf. 457; *Lynch v. Hill*, 6 Munf. 114; *Mazyck v. Vanderhorst*, Bailey, Ch. 48; *Rice v. Satterwhite*, 1 Dev. & Batt. Eq. 69; *Postell v. Postell*, Bailey, Ch. 390.

The remoteness of vesting is determined by what is possible, and not by what actually occurs. *Moore v. Moore*, 6 Jones, Eq. 132. See *Longdon v. Simson*, 12 Vesey, 295; *O'Neill v. Lucas*, 2 Keen, 313; *Loring v. Blake*, 98 Mass. 253.

A direction to accumulate all the testator's estate for the term of fifteen years after the testator's decease by investment and reinvestment in government bonds, and, at the expiration of that time, divide it equally among all his children, is a valid direction. *Rhoads v. Rhoads*, 43 Ill. 239; ante, § 36, pl. 71, and note.

⁷ *Longdon v. Simson*, 12 Vesey, 295; *Griffiths v. Vere*, 9 Vesey, 127; *Palmer v. Holford*, 4 Russ. 403; *Rosslyn's Trust*, 16 Sim. 391.

⁸ *Boughton v. James*, 1 Coll. C. C. 26; s. c. 1 Ho. Lds. Cas. 406; *Scarbrick v. Skelmersdale*, 17 Sim. 187; 1 *Jarman*, 286.

⁹ 1 *Jarman*, 287, and cases cited. But the act says, "the debts of any person." 1 *Jarman*, 295.

may be regarded as determinable much upon the same principle before the Thellusson Act as since. The cases upon the point under the statute may therefore be of some value to be here adverted to.

* 563 * (1.) Where there is a present gift in possession, and the direction for accumulation is merely given to govern the mode of enjoyment, the result is to give those entitled the present income the same as if the direction had not been given.¹⁰

(2.) Where the trust for accumulation is grafted upon an estate, where vesting is deferred, or made contingent, until after the period of accumulation, the statute, by stopping the accumulation, does not hasten the vesting or the possession, and the income goes to the residuary legatee, or the heir, as it is personal or real estate, until the vesting or possession of the estate is matured.¹¹ But where the residue is not given absolutely, but only for life or years, the interest upon a legacy thus directed to be accumulated beyond the legal period goes into the residue of the estate as capital.¹²

(3.) And where a residue is directed to be accumulated, the income, when its accumulation becomes illegal, will go to the heir or next of kin, as the case may be real or personal estate.¹³

(4.) And the income of the accumulations follows the same rule as the accumulations.¹⁴

7. The rule against accumulations applies not only to cases which expressly provide for it, but equally to such as make provisions which by implication result in such accumulations; as

¹⁰ *Clulow's Trust*, 5 Jur. N. S. 1002; *Trickey v. Trickey*, 3 My. & K. 560; 1 Jarman, 291. In a very recent case, *Combe v. Hughes*, 11 Jur. N. S. 194, Rolls, s. c. id. Ch. App. 380, it was held in the Court of Chancery Appeal, that where a will contains an absolute gift, followed by a direction to accumulate for more than twenty-one years, the income after the twenty-one years passes under the previous gift, and is not undisposed of.

¹¹ 1 Jarman, 292; *M'Donald v. Bryce*, 2 Keen, 276; *Eyre v. Marsden*, id. 564; *Ellis v. Maxwell*, 3 Beav. 587, 597; *Nettleton v. Stephenson*, 3 DeG. & Sm. 366; *Lord Barrington v. Liddell*, 10 Hare, 429; *Attorney-General v. Poulden*, 3 Hare, 555; *Jones v. Maggs*, 9 Hare, 605; *Simmons v. Pitt*, L. R. 8 Ch. 978.

¹² *Crawley v. Crawley*, 7 Sim. 427; *Morgan v. Morgan*, 4 DeG. & Sm. 164, 175.

¹³ 1 Jarman, 292; *Hull v. Hull*, 24 N. Y. Ct. App. 647; *Talbot v. Jevers*, 23 W. R. 74; s. c. L. R. 20 Eq. 255.

¹⁴ 1 Jarman, 292, and cases cited.

where the whole residue of an estate is given in such a manner as to postpone the vesting until a period beyond the term allowed by law, this, of necessity, involves the accumulation of such residue, by adding income to principal during the time for which the vesting or possession is suspended.¹⁵

* 8. It has been made a question, how far a provision in a * 564 will for the payment of premiums upon insurance upon the lives of beneficiaries under the will is obnoxious to the objection of infringing the rule against accumulation. In *Bassil v. Lister*,¹⁶ Sir *G. J. Turner*, Vice-Chancellor, gave an elaborate opinion against the proposition that any such direction came within the rule against accumulation. But the argument of the learned judge is quite unsatisfactory to the editors of the last English edition of *Mr. Jarman*, and is, perhaps, liable to some exception, as opening a very wide door for evading the statute and the common-law rule against accumulation. We apprehend, however, that there can be no just ground of objection to such a direction as was contained in the will in that case, it being for the payment of the premiums upon two policies for the life of the testator's two sons, procured by the testator himself.

9. If life insurance should be sought by testators, as a mode of escaping from the restraints of the rule against accumulation, as matter of evasion, it ought to be held to come within the evils intended to be guarded against. But to hold that life insurance is, in all cases, a mere mode of accumulation, and nothing more, seems to be a very forced construction of the facts involved in such a transaction. It is more obnoxious to the charge of being a species of betting or gambling, — a kind of lottery, dependent upon the chances of human life, — than that of being a species of accumulation.¹⁷

¹⁵ 1 *Jarman*, 293. Sir *L. Shadwell* defines the rule in such cases somewhat differently; but the cases confirm the proposition in the text. *Elborne v. Goode*, 14 Sim. 165; *Corporation of Bridgnorth v. Collins*, 15 Sim. 538; *Evans v. Hellier*, 5 Cl. & Fin. 114; s. c. nom. *Shaw v. Rhodes*, 1 My. & Cr. 135; *M'Donald v. Bryce*, 2 Keen, 276; *Tench v. Cheese*, 6 DeG., M & G. 453; *Bryan v. Collins*, 16 Beav. 14. In this latter case it was held, that one entitled to a fund upon the happening of a contingency, where the accumulation is directed beyond the time allowed, is entitled to the interest upon the fund from the period that the accumulation becomes illegal.

¹⁶ 9 Hare, 177.

¹⁷ 1 *Jarman*, 294-297.

10. Accumulation of the income of real estate for the benefit of infants in esse at the time such accumulations are directed to begin, and which must terminate with the minorities of the respective legatees, is valid under the New-York statute.¹⁸ But where

the children for whose benefit the accumulation is directed * 565 * are not in esse at the time the accumulation is to begin, and where the right to the accumulated fund is altogether contingent, the direction is void.¹⁸

11. Where the will contains different trusts, some of which are valid and others void, or not authorized by the statute, and there are distinct and independent provisions as to different portions of the testator's property, or where different estates or interests in the same portions of the property are created, some of which estates, provisions, or interests, are valid, and others invalid, the valid trusts, provisions, estates, or interests, will be preserved, unless they are so dependent upon, or intermingled with, those which are invalid, as not to be separable, without defeating the general intent of the testator.¹⁸

12. Trusts for accumulation, except for infants, are prohibited by the New-York statute. A trust, therefore, to accumulate the rents and profits of real estate, or the interest or income of personal estate, cannot be created for the benefit of a lunatic who is not an infant. But where an annuity is given absolutely to a lunatic, a court of equity may direct the surplus, beyond what is required for his support, to be paid over to his committee, and invested for his use. And this will result in an accumulation for his benefit or that of the next of kin, but it is not a trust for accumulation which is prohibited by the statute.¹⁹

¹⁸ *Haxtun v. Corse*, 2 Barb. Ch. 506. See post, pl. 12.

¹⁹ *Craig v. Craig*, 3 Barb. Ch. 76. See *Lovering v. Worthington*, 106 Mass. 86. A direction in the will to accumulate the estate of a lunatic beyond the time allowed by law is invalid, and the next of kin will be entitled to the accumulations. *Mathews v. Keble*, Law Rep. 4 Eq. 467; s. c. 3 Ch. App. 691. See also *Fosdick v. Fosdick*, 6 Allen, 41. But accumulation of the estate of a lunatic, by operation of law or the order of the court, is not within the law against accumulations. *Ib.* A direction for the executors to retain possession of the testator's real estate until certain mortgages upon that and other property of the testator could be paid off, in addition to other charges created by the will, was held void, as tending to lock up the estate beyond the limit allowed by law. *Killam v. Allen*, 52 Barb. 605. We should be surprised to have this case affirmed in the Court of Appeals. But see *Reformed Dutch Church v. Brandow*, id. 228; *White v. Howard*, id. 294; s. c. 46 N. Y. 144.

13. Where bequests are given, as already stated, with directions for accumulation which are void under the statute, it is held in New York, in accordance with the English rule before stated, that only the direction for accumulation is to be held void, and that the bequest will take effect the same as if no such direction had been given.²⁰

* 14. But in Pennsylvania it has been held that a devise * 566 of land for the accumulation of the income beyond the term allowed is absolutely void, and that the heir is entitled to receive the same.²¹ But in a late case in Massachusetts the bequest was held valid, even if directed to be accumulated beyond the legal limit.²²

²⁰ Ante, § 36, pl. 71, and note.

²¹ *Hillyard v. Miller*, 10 Penn. St. 326.

²² *Odell v. Odell*, 10 Allen, 1; ante, § 36, pl. 70.

PERPETUITIES.

1. The rule against perpetuities, one of the safeguards of social industry, invented by the courts.
2. The term allowed is that of a life or lives in existence at the death of testator, and twenty-one years.
3. The period of gestation is only to be added in case of a devisee en ventre sa mère.
4. The term cannot ordinarily be extended beyond twenty-one years, where the lives are omitted.
5. But this may be done where the estate ultimately vests in persons living at testator's death.
6. The rule against limiting an estate after indefinite failure of issue does not apply to a limit after an estate tail.
7. Illustrations of the preceding rule.
8. A limitation after an estate, which may be avoided by the owner of the estate, is valid.
9. Where the money is properly raised, and its application is avoided, it goes to the heir, if out of realty.
10. The rule against perpetuities often violated in devises to classes, and to those not in existence.
11. A remainder may be valid, while an executory devise depending on same event is not.
12. Illustration of the rule by devise of a reversionary interest.
13. Contingent remainders of equitable estates follow the rule of executory devises as to remoteness.
14. The question of remoteness has reference to what *may* occur.
15. Trusts of personal estates not always valid, if dependent upon same terms as real estate.
16. The events and persons must necessarily come within the rule with reference to the death of testator.
17. Less danger of transgressing the rule as to one's own issue than that of others.
18. Testator may so frame his limitations as to depend upon events as they occur.
19. Devise to unborn persons valid, and may be so framed as to vest in their issue.
20. Devise dependent upon alternative limitations may stand or fail, according as one or the other occur.
21. One cannot empower trustees to limit an estate contrary to the rule.
22. The American courts maintain the English rule against perpetuities.
23. Where there is a void direction attached to a devise, the same takes effect absolutely.
24. Trusts to maintain tombs void, as tending to perpetuity.
25. Bequest for a hospital, thereafter to be incorporated, valid.

* § 38. 1. THE rule of the common law against perpe- * 568
tuities is one of the instances wherein the living principles
of the unwritten common law of England, through the forming
power of an independent judiciary, have gradually shaped them-
selves into an essential muniment and safeguard of social life and
of successful industry, in not allowing the conceits or fancies of
dying men, unwilling to lose their hold upon the brief empire
which property allows the living, to embarrass and control the
generations still possessing the functions of active life, by the
tightening grasp of exclusive self-love.¹

2. The rule of limitation finally fixed is the period of a life
or lives in being at the death of the testator, and the term of
twenty-one years more. It was long made a question, whether the
term of twenty-one years was to be allowed in all cases, or only
where the object of the devise was an infant, so as to allow of
such devisee arriving at full age.² But it was finally determined
that the term of twenty-one years might in all cases be added.³

3. The possible addition of the period of gestation will occur in
those cases where the devise over is made to the children of a
male person when they shall attain twenty-one; and at the decease
of the father, being one of the lives upon which the estate is
dependent, such child is *en ventre sa mère*.⁴

4. And the testator cannot postpone the vesting of an executory
devise for a longer term than twenty-one years, even where he does
not avail himself of the privilege of the life or lives in being at
his decease. Thus where the testator directed a postponement of
the vesting for twenty-eight years after his death, it was held a
void limitation; and there being other limitations dependent upon
this, they fell with it.⁵

¹ 1 Jarman, 226, 227.

² *Beard v. Westcott*, 5 Taunt. 393; s. c. 5 B. & Ald. 801; s. c. Turn. & R.
25.

³ *Bengough v. Edridge*, 1 Sim. 173; s. c. nom. *Cadell v. Palmer*, 10 Bing.
140, 7 Bligh, 202, 1 Cl. & Fin. 372. The unanimous opinion of the judges
was delivered by Mr. Baron *Bayley*, to the effect that "a life or lives in being,
and twenty-one years, without reference to the infancy of any person what-
ever," was the true limit of the time of vesting an executory devise. And it
was here declared that the period of gestation was only to be added in the
case of one *en ventre sa mère* at the termination of the lives in being. Ante,
§ 36, pl. 71, n. 173.

⁴ 1 Jarman, 228, 229.

⁵ *Palmer v. Holford*, 4 Russ. 403; *Speakman v. Speakman*, 8 Hare, 180.

* 569 * 5. But this rule does not preclude one from postponing the vesting for thirty or any number of years, provided it be ultimately to vest in persons who are living both at the time of the testator's death and at the time of the vesting,⁶ since that renders it impossible for the term to extend beyond the period of an existing life.

6. We have before alluded to the rule of law, that an executory devise, to take effect after the indefinite failure of issue of a person living or deceased, is void for remoteness;⁷ but the rule does not apply to such estates limited to take effect after an estate tail, because the power of the owner of that estate to destroy it by means of a common recovery or an ordinary deed, enrolled under the present English statute and under similar American statutes, takes the case out of the mischief intended to be remedied by the rule.⁸

7. So in case of an executory devise to take effect upon one entitled in tail failing to assume the name and bear the arms of the testator, or in case another property should devolve upon him, or upon any other condition subsequent, the devise is good, although it would have been void if thus grafted upon an estate in fee-simple.⁹

8. The power of the owner of an estate tail to destroy another estate connected with the estate tail depends upon whether the estate is prior or subsequent to the estate tail. In the former case the estate cannot be defeated by any act of the tenant in tail, and in the latter it may be; and consequently a limitation after such estate may be valid or invalid, according as the prior estate is held liable, or not, to be destroyed by the tenant in tail.¹⁰

⁶ *Lachlan v. Reynolds*, 9 Hare, 796; 1 Jarman (ed. 1861), 290.

⁷ Ante, § 17, pl. 31. See also *Badger v. Lloyd*, 1 Salk. 232; *Moore v. Parker*, 1 Ld. Ray. 37; *Lepine v. Ferard*, 2 Russ. & My. 378; *Carter v. Bental*, 2 Beav. 551. The word "issue" in this case received two different constructions in different portions of the same will, which is contrary to the ordinary rules of construction.

⁸ *Gulliver v. Ashby*, 4 Burr. 1929; *Attorney-General v. Milner*, 3 Atk. 111; *Goodwin v. Clark*, 1 Lev. 35; *Faulkner v. Daniel*, 3 Hare, 199; *Morse v. Ormonde*, 1 Russ. 382; *Bristow v. Boothby*, 2 Sim. & Stu. 465.

⁹ *Nicolls v. Sheffield*, 2 Br. C. C. 215; *Carr v. Earl of Erroll*, 6 East, 58; *Earl of Scarborough v. Savile*, 3 Ad. & El. 897.

¹⁰ *Eales v. Conn*, 4 Sim. 65; *Case v. Drosier*, 2 Keen, 764; s. c. cited 1 Jar-

* 9. A trust for raising a sum of money may be valid, although the trusts declared in regard to the money when raised may be void for remoteness; in which case the heir of the testator will take it as personal estate,¹¹ arising out of the realty.

10. The rule against perpetuities is most frequently violated by devises to classes, individuals of which may not come into existence during the life in being, at the testator's death and twenty-one years; or to persons not in existence at the death of the testator, and whose estate is deferred beyond the period of reaching majority.¹² In the former class of cases the estate is regarded as too remote; notwithstanding it is so framed as to vest immediately upon the birth of the devisee.

11. But it seems to be settled that an estate in remainder may be perfectly valid, while an executory devise dependent upon the same event will be void for remoteness.¹³

12. A reversionary interest limited upon an event too remote for the vesting of an executory devise cannot be devised, notwithstanding that a remainder limited upon the same event will be valid.¹⁴

13. Contingent remainders of trust, or equitable estates, do not follow the strict rules applicable to such legal estates, but await the contingency upon which they are made dependent, notwithstanding the determination of the particular estate, so as to effectuate the intent of the testator; and if the event is too

man, 231; s. c. 5 My. & Cr. 246; *Doe d. v. Earl of Scarborough*, 3 Ad. & El. 2, where the question is a good deal discussed. See also *Sykes v. Sykes*, L. R. 13 Eq. 56.

¹¹ 1 Jarman, 233; *Tregonwell v. Sydenham*, 3 Dow, 194; *Burley v. Evelyn*, 16 Sim. 290.

¹² 1 Jarman, 233; *Dodd v. Wake*, 8 Sim. 615; *Boughton v. James*, 1 Coll. C. C. 26; s. c. 1 Ho. Lds. Cas. 406.

¹³ *Cole v. Sewell*, 4 D. & War. 1. Lord *St. Leonards* thus states this point: "It is now perfectly settled, that, where a limitation is to take effect as a remainder, remoteness is out of the question." And the learned judge proceeds to discuss the question with his usual clearness. 1 Jarman, 234-236; *Doe d. Winter v. Perratt*, 9 Cl. & Fin. 606. Here the person to whom the remainder was given was too remote for an executory devise; but it was held no valid objection to a remainder.

¹⁴ *Badger v. Lloyd*, 1 Ld. Ray. 523, where it is held that the devise of a reversion is of a present vested interest; and, if made contingent upon an event too remote, it will be void on that account. *Bankes v. Holme*, 1 Russ. 394, n.; *Doe v. Fonnereau*, 2 Doug. 487. See also *Bristow v. Boothby*, 2 Sim. & Stu. 465; *Morse v. Ormonde*, 1 Russ. 382.

* 571 remote, * they will therefore fail.¹⁵ Thus a devise in remainder to a class will vest in the first of the class who comes to answer the description of the will, opening to admit all the subsequent members of the class, thus preserving the estate, although some members of the class may not come into existence, or attain the requisite age, within the limit of the rule against perpetuities.¹⁶ But the same rule will not apply to equitable interests, the vesting of which must await the time of distribution and the ascertainment of the class at that time; and the estates will consequently fail for remoteness in toto if that event be too remote, notwithstanding some of the class may have reached the prescribed age before.¹⁷ There has been a great deal of controversy in the English courts upon the question, how far a gift to persons within the allowed limits fails by being mixed up with others whose share cannot be ascertained so as to determine what would go to the former members of the class, without waiting beyond the limits allowed by the rule against perpetuities.¹⁸

14. The question of remoteness, as we have already intimated, is to be determined with regard to possible events, and not to those which actually occur. If, therefore, the limitation is to such persons, or upon such events, that it *may* extend beyond the allowed limit, the devise will be void for remoteness, notwithstanding the fact that it may or does occur within the limits allowed by law.¹⁹

¹⁵ *Hopkins v. Hopkins*, 1 Atk. 581; *Monypenny v. Dering*, 7 Hare, 568, 590.

¹⁶ *Mogg v. Mogg*, 1 Mer. 654; *Festing v. Allen*, 12 M. & W. 279; *Alexander v. Alexander*, 16 C. B. 59.

¹⁷ *Blagrove v. Hancock*, 16 Sim. 371; *Walker v. Mower*, 16 Beav. 365; *Leake v. Robinson*, 2 Mer. 363.

¹⁸ *Arnold v. Congreve*, 1 Russ. & My. 209; *Griffith v. Pownall*, 13 Sim. 393; *Greenwood v. Roberts*, 15 Beav. 92; *Lord Dungannon v. Smith*, 12 Cl. & Fin. 546; *Merlin v. Blagrove*, 25 Beav. 125; *Storrs v. Benbow*, 3 DeG., M. & G. 390; *Seaman v. Wood*, 22 Beav. 591; *Cattlin v. Brown*, 11 Hare, 372; *Vanderplank v. King*, 3 Hare, 1; *Webster v. Boddington*, 26 Beav. 128; *Wilson v. Wilson*, 4 Jur. n. s. 1076; s. c. 28, L. J. Ch. n. s. 95. It seems to be considered now in England, that the portion of gifts, connected with others to which the objection of remoteness attaches, may be sound and valid. *Moseley's Trusts*, L. R. 11 Eq. 499.

¹⁹ *Church in Brattle Square v. Grant*, 3 Gray, 142; *Jee v. Audley*, 1 Cox, 324; *Hodson v. Ball*, 14 Sim. 558; *Lett v. Randall*, 3 Sm. & G. 83. And it is not competent to legalize a bequest over, after the life of the first taker and of

* 15. Trusts of personal estate, attendant upon a devise of * 572 land, will not always be valid, if limited to the same persons, especially where the vesting in *any* tenant in tail is provided not to take effect until he shall attain the age of twenty-one.²⁰ But if such trust be for the purpose of discharging an incumbrance upon the estate, it will be maintained.²¹

16. The persons to take, and the interests to be taken, must be such as necessarily are to be ascertained within the proper period.²² And in deciding on the question of remoteness, the state of circumstances at the testator's death, and not at the date of the will, is to be regarded.²³

17. In regard to provisions for grandchildren of the testator, there is less danger of transgressing the rule against perpetuity than in regard to the children and grandchildren of another person; since one's own children must be in esse at his own decease, and their children also at their decease: so that a limitation to one's own grandchildren, not protracted as to vesting beyond their ages of twenty-one, will be sure to come within the rule; while the same rule will by no means hold as to the grandchildren of another.²⁴

18. But the testator may make his limitation depend in terms upon the happening of events after the date of his will, or even after his death.²⁵

all her children, by showing that she, being a married woman, was past child-bearing at the date of the bequest, and that, therefore, the bequest must have reference to children then living. *Sayer's Trusts*, Law Rep. 6 Eq. 319. See *Heasman v. Pearse*, L. R. 11 Eq. 522; *Schettler v. Smith*, 41 N. Y. 328. But where the trusts are separable, those only are avoided which are too remote. *Post v. Hover*, 33 N. Y. 593; *Ackerman v. Vreeland*, 1 McCarter, 23.

²⁰ *Lincoln v. Newcastle*, 12 Vesey, 218, 232, 233; *Dungannon v. Smith*, 12 Cl. & Fin. 546.

²¹ *Southampton v. Hertford*, 2 V. & B. 54; *Briggs v. Earl of Oxford*, 1 DeG., M. & G. 363; *Gilbertson v. Richards*, 6 Jur. n. s. 672; s. c. 5 H. & N. 453.

²² *Curtis v. Lukin*, 5 Beav. 147, 155.

²³ *Tregonwell v. Sydenham*, 3 Dow, 194, 215, and numerous other cases cited in the latest English edition of Jarman, vol. 2, 257, and note, most of which have been before referred to, the latest of which is the opinion of Lord St. Leonards, in *Monypenny v. Dering*, 2 DeG., M. & G. 145, 170. See also *Dungannon v. Smith*, 12 Cl. & Fin. 546. *Harrington v. Harrington*, L. R. 5 Ho. Lds. 87.

²⁴ 1 Jarman, 258; *Otis v. McLellan*, 13 Allen, 339.

²⁵ *Deerhurst v. St. Albans*, 5 Madd. 232; s. c. nom. *Tollemache v. Coven-*

19. It seems to be settled that a devise to an unborn person for life is valid, and that an executory devise to the issue of * 573 such * unborn person will be valid if the will provides that in order to take they must come into existence during the continuance of lives in existence, and twenty-one years.²⁶ And a remainder after the termination of such life-estate is valid, if made in favor of persons competent to take.²⁷

20. Alternative limitations may be so framed as to be good or bad according to the event; and if the contingency which is valid occur the estate will be held legal, notwithstanding the other alternative may be too remote.²⁸ And it makes no difference in this respect that the alternatives are not distinctly expressed, but involved in words which apply equally to both limitations.²⁹

21. One cannot empower trustees to limit an estate beyond the limits of the rule against perpetuities; but the persons appointed to take must have been capable of taking directly under the will.³⁰

22. The American courts have followed the English rule against perpetuities, except that in some instances it has been qualified by statutory enactments. A suspension of the vesting of real estate by devise, during the lives of the testator's widow and children, is valid.³¹ But a bequest to charitable uses was held not to be within the constitutional provisions of the statute of Texas against perpetuities.³²

23. It has been decided in a recent English case, that a direction, in a devise of land to a college, that the same should be leased to

try, 2 Cl. & Fin. 611, 8 Bligh, 547. See also *Hosea v. Jacobs*, 98 Mass. 65, where it is held, that if at the republication of the will, or even at the death of the testatrix, all contingency is removed by events transpiring after the date of the will, the estate will not be avoided by any possible remoteness of vesting by the terms of its original creation.

²⁶ 1 Jarman, 262; *Cadell v. Palmer*, 7 Bligh, 202; s. c. 1 Cl. & Fin. 372.

²⁷ 1 Jarman, 264. But see *Cooke v. Bowler*, 2 Keen, 54.

²⁸ *Longhead v. Phelps*, 2 Wm. Bl. 704; *Leake v. Robinson*, 2 Mer. 363; *Goring v. Howard*, 16 Sim. 395; *Minter v. Wraith*, 13 id. 52; *Monypenny v. Dering*, 2 DeG., M. & G. 145; *Cambridge v. Rous*, 25 Beav. 409.

²⁹ *Challis v. Doe*, 18 Q. B. 231; *Burley v. Evelyn*, 16 Sim. 290; *Proctor v. Bishop of Bath and Wells*, 2 H. Bl. 358.

³⁰ *Marlborough v. Godolphin*, 1 Eden, 404; *Robinson v. Hardcastle*, 2 T. R. 241, 380, 781.

³¹ *Griffen v. Ford*, 1 Bosw. N. Y. Sup. Ct. 123.

³² *Paschal v. Acklin*, 27 Texas, 173.

his wife's relations for ever at two-thirds of its value, was a void direction, as tending to perpetuity; and that, consequently, the devise took effect absolutely in the college in the first instance.³³

* 24. A gift, the income of which is to be applied to keeping the tombs of the testator and his family in repair, is void, as tending to perpetuity; and if so connected a gift over as to be inseparable, both will be held void.³⁴ * 574

25. Where the testator bequeathed the residue of his estate to nine trustees for the establishment of a hospital for sick and diseased persons, and directed them to apply for a charter incorporating the same, and, if not obtained within two years, "provided two lives named in his will should continue so long," the trustees were to pay over the bequest to the United States. It was held the bequest was not void, either for remoteness or uncertainty, so far as the creation of the hospital was concerned,³⁵ but was a valid executory devise.

³³ Attorney-General v. Greenhill, 9 Jur. N. S. 1307.

³⁴ Fowler v. Fowler, 10 Jur. N. S. 648; s. c. 12 W. R. 972.

³⁵ Burrill v. Boardman, 43 N. Y. 254. See also Schettler v. Smith, 41 N. Y. 328; Attorney-General v. Downing, Wilmot's Opinion, 16; Inglis v. Sailors' Snug Harbor, 3 Pet. U. S. 99. But where the suspension may exceed three lives, and one term of minority, it will avoid both the primary and dependent bequest. Rose v. Rose, 4 Abb. App. Dec. 108.

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